TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, PETITIONERS,

vs.

INDIANA TOLL ROAD COMMISSION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR CERTIORARI FILED APRIL 14, 1964
CERTIORARI GRANTED MAY 25, 1964

SUPREME COURT OF THE UNITED STATES

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IN THE LAKE CIRCUIT COURT OF LAKE COUNTY, INDIANA

Cause No. C56-605

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendants.

COMPLAINT—Filed July 26, 1956

1.

Come now the plaintiffs herein and allege and say: That they are engaged as a partnership, carrying on a business generally catering to the aviation industry, which is located on what is known as the Gary Municipal Airport through and by virtue of certain leaseholds, which the plaintiffs hold on said airport, and

2.

The defendants are a creation of the Acts of the Indiana General Assembly, 1951, Chapter 281, wherein it was created a quasi-public corporation and body politic; sui juris within the premises herein set out, together with the sovereign power of eminent domain delegated to it by the sovereign State of Indiana in said Act.

3.

Factual Situation With Respect to These Plaintiffs in the Premises

3-a. The municipal City of Gary, Indiana, is a municipal corporation, duly organized and existing, pursuant to the

[fol. 6] general laws and statutes of the State of Indiana and its municipal charter and carries on the general activities usual to municipal corporation.

3-b. Particularly and specifically, and within the premises of this complaint, the said City of Gary, as provided by law, created an airport commission by its certain Ordinance No. 2897 which was passed by the common council of said city on the 19th day of September, 1949, and was approved and signed by the mayor of said City of Gary on the 20th day of September, 1949.

3-c. That said City of Gary, through said airport commission, has acquired a municipal airport, which is generally located in Sections 35 and 36 in Township 37 North, Range 9 West, otherwise known as Calumet Township, Lake County, Indiana, and all within the corporate limits of said city; said airport is generally bounded on the north by what is known as Industrial Highway and on the east by what is known as Clark Road and on the south by what is known as the Grand Calumet River, and to the west, the confines of said airport generally approach and are adjacent to the right of way of the E. J. E. R. R. Company, as same is extended through Section 35 as aforesaid.

3-d. That upon procuring the lands aforesaid, which approximate a square mile of land, large sums of money were expended through municipal funds and grants from the United States Government and greatly in excess of $300,000.00.

3-e. Said airport is strategically located in the heart of the Milwaukee, Chicago, Hammond, East Chicago, Gary, Michigan City and South Bend industrial area. Great mili-[fol. 7] tary installations now exist either on said airport or directly adjacent thereto in accordance with defense necessities and requirements peculiar to the location of said airport.

3-f. That at the time of the promulgation of the aforesaid ordinance, there was included therein, and as a part thereof, what is known as the Gary Airport Zoning Map which delineated, defined and described details of construc-

tion and the boundaries of said airport, copies of which were then and there on file in the office of the City Engineer; and by reason of said ordinance and its incorporation of the map aforesaid therein same became a part of the official public records in the office of the City Clerk of the City of Gary.

3-g. That by reason of said ordinance and the general statutes of the State of Indiana pertaining thereto, the said City of Gary was given and acquired jurisdiction over structures for six (6) miles in all directions, radiating from said airport.

3-h. That by reason of said ordinance and the jurisdiction acquired thereby, it was duly ordained that no structure should be erected within the inner approach zone to any proposed runway and extending 6,000 feet from the proposed runway, to any height which would interfere with a glide angle of 40 feet horizontally to 1 foot vertical slope. That said ordinance provided for the acquiring of non-conforming uses and variances, which might be granted upon the showing of good and sufficient reasons therefore by the Board of Zoning Appeals in the City of Gary and under its rules and regulations which were designed to give all persons affected an opportunity to be heard.

[fol. 8] 3-i. That as a part of the improvements on said airport, there is established what is known as the north-south runway (all of which is disclosed by the Gary Airport Zoning Map, which is a part of the aforesaid ordinance), and which was designed to extend for approximately 4,000 feet along and across said airport property; and as laid out thereon was ample and sufficient for the accommodation of aircraft of all categories.

3-j. Plaintiffs further say that generally the City of Gary and the United States Government, through grants of money, built, constructed and established runways, taxi ways, park ways, building areas, ramps and utilities to be used as an airport and the establishment of leaseholds thereon and all subsequent to the zoning of the adjacent areas to the airport, which zoning had for its purpose, the limiting of heights of structures in the areas adjacent to said air-

port and making possible safe ingress and egress from said runways by those operating aircraft in and out of said airport.

3-k. That thereafter and on or about the 23rd day of March 1950, these plaintiffs were induced by the general development of said airport and the ordinance aforesaid and the zoning regulations therein, as aforesaid, and the general laws of the State of Indiana then and there existing, pertaining to the operation of airports, to enter into certain contracts with the City of Gary wherein these plaintiffs acquired certain leaseholds upon the Gary Municipal Airport, established as aforesaid, wherein these plaintiffs, in addition to the general privileges as a fixed base operation which gave these plaintiffs the right to the use of runways, [fol. 9] taxi ways, aprons, parking areas, roadways, sidewalks, navigation and aviation aids and all landing area appurtenances, facilities and improvements then or thereafter to be connected with or appurtenant to the airport and the particular privileges, uses, rights and interests necessary to:

1. The loading and unloading of airplanes owned, leased or operated by the lessee;
2. The servicing and maintaining of airplanes owned, leased, sold or operated by the lessee;
3. The maintenance, storing and servicing of airplanes; overhauling, rebuilding, repairing, inspection and licensing of same and the purchase of and sale of parts and accessories;
4. The right to buy and sell airplanes, parts and accessories, aviation parts and equipment of all descriptions, retail or wholesale, or as a dealer; distributing confections and refreshments vended by coin operated machines; and the right to maintain on the demised premises, appropriate facilities for the conducting of said business.
5. Training on the premises and generally on the airport, of personnel, in the employ of these plaintiffs and

members of the public generally as students or otherwise in any art, craft or skill pertaining directly or indirectly to aircraft. The free and unrestricted use of air field facilities and navigation aids and facilities relating thereto for the purpose of commercial and non-commercial landings, take-offs and taxiing.

6. These plaintiffs obtained the right to have the full and unrestricted use of and the right of ingress and egress to and from the demised premises, which rights of ingress and egress were extended to all those dealing with these plaintiffs and the aviation business and these plaintiffs also acquired the rights by said contracts and lease to locate, construct, erect and maintain or remove improvements upon the demised premises for the purpose of carrying out the activities usual to the aviation business and as herein set out.

7. That the term of said leasehold was the period of twenty (20) years from the date of the execution thereof with an option for an additional ten (10) year period, all of which is more particularly disclosed by the contracts and leasehold as executed by these plaintiffs and the duly constituted authorities of the City of Gary as disclosed by the recordation of said leasehold in the Miscellaneous records of Lake County in Book [fol. 10] 553, Page 377, on the 12th day of September, 1951; That after the execution of said leasehold and contract recorded as aforesaid, these plaintiffs expended large sums of money, to-wit: approximately $400,000.00 in the building of hangars, the purchase of equipment, and facilities for operation of general business upon said airport as hereinbefore set out.

3-l. And now the plaintiffs say they have for many years been engaged in the operation of airports and the aviation business; that they are experts and skilled in the business, arts and trades connected therewith; that they have established a sound and successful business enterprise as herein described, upon the leasehold herein described; that they have kept particular and accurate accounts of their business from 1951 until presently on the Gary Municipal Airport

and that they are thereby able to project the earnings of said business into the future and for a period of 25 years remaining on their leasehold and that during said time these plaintiffs would anticipate a business of approximately *$21,665,807.38* over said period of time.

4.

Factual Situation With Respect to the Defendant in the Premises

4-a. And now the plaintiffs show the court that the defendant, which came into existence as hereinbefore set out in Paragraph 2 herein, was declared by the legislature to have been created for the purpose of alleviating alleged handicaps and hazards due to alleged congestion on public highways of the state; and to facilitate vehicular traffic throughout the state; and generally to promote the agricultural and industrial developments in the state; and allegedly to provide for the general welfare by the construction of modern [fol. 11] express highways; and, in particular, the defendant was authorized, at its pleasure, to construct and maintain and repair and operate toll road projects, the location of said projects to be approved by the government of the State of Indiana.

4-b. These plaintiffs say that after careful examination of the act creating the defendant, the actual purpose for the creating of the defendant corporation was to create a special kind of corporation by legislative enactment rather than a general creation under the general corporation laws of the state; and to invest in it certain particular attributes of the sovereign, that is to say, the powers of eminent domain and the general complexion of a public corporation while doing a private business of providing a means whereby private investments could be made to approximately one-quarter billion dollars of tax exempt securities and the real purpose for the corporation was to carry on a toll road business and from the proceeds of said business, to pay off said investments.

4-c. Plaintiffs allege further that under said act, the legislature did not direct the location of any toll roads and

made no declarations as to where necessity may require the location of such toll roads, all of which was left to the discretion of a commission created by said act. That after its creation, as aforesaid, the commission aforesaid, proceeded to make a survey of the most likely and productive territory for the location of a toll road and determined to locate same along and parallel with the southerly side of the Gary Municipal Airport, and in such a manner as to cross through [fol. 12] the inner area approach zone of the north-south runway, and within 450 feet of the proposed end of said runway as set out, described and defined by the Gary Airport Zoning Map, described as aforesaid, and in such a manner as to insinuate the top of said highway approximately 23 feet into the glide path established by the aforesaid Ordinance No. 2897 and the Gary Airport Zoning Map which is a part of said ordinance, as aforesaid.

4-d. That at the time of the establishment of said toll road, located particularly, as aforesaid, and the construction thereof, the defendant commission and members thereof were charged with knowledge of the location of said airport, and the zoning limitations pertaining thereto, and as set out in said ordinances and the Gary Airport Zoning Map, which was made a part thereof, and all a part of the public records in the Office of the Clerk of the City of Gary, Indiana.

4-e. That the defendant commission and the members thereof were charged with notice of the rights of these plaintiffs upon said airport, and their investments therein, and their rights therein, by reason of the fact that their possession of the premises was open and notorious and their leasehold and all their rights and interest therein were fully described and set out and made a part of the public records of Lake County, Indiana when said contracts and leaseholds were recorded on September 12, 1951, in Miscellaneous Record Book 553, Page 377 in said county and all of which the defendants were required to take notice.

[fol. 13] 5.

How the Plaintiffs Were Damaged by the Acts of the Defendant

5-a. And now the plaintiffs show the court that their entire investment upon the said Gary Municipal Airport, as aforesaid, in the sum of approximately $400,000.00 was induced, as aforesaid, by the acts of the City of Gary, creating an airport commission and establishing said airport and the zoning of the adjacent lands for the protection and preserving of safe ingress and egress of aircraft into and upon and out of the runways established on said airport.

5-b. That said airport, created as aforesaid, created a public utility under the statutes of the State of Indiana; and when established as aforesaid, caused the contracts and the leaseholds entered into and obtained by these plaintiffs from said City of Gary, to be very valuable property rights which the plaintiffs had a right to enjoy during the terms thereof without interference from any person or corporation, including the defendant.

5-c. The plaintiffs further say that the establishment of said road within close proximity of the end of said runway and at such an elevation, as aforesaid, which added to traffic clearance on said road will work to cut the glide path of aircraft coming into said runway from an established 40 to 1 glide angle to approximately 12.5 to 1, and thus has rendered the future use of said runway useless for all practical purposes to aircraft grossing more than 15,000 pounds.

5-d. That the establishment of said highway, as afore- [fol. 14] said, was in violation of Ordinance No. 2897 and the zoning provisions contained therein, and the lawful rights of these plaintiffs as guaranteed by the 21st Sec. of Article 1 of the Constitution of Indiana and Art. 1, Sec. 10 and the 14th Amendment to the Constitution of the United States. That the establishment of said highway, as aforesaid, has greatly mitigated and lessened the value of the leasehold and the investments of these plaintiffs as aforesaid, upon said airport and the revenues which these plain-

tiffs could expect from their operations and business activities on said airport, and constitutes an unlawful taking of the plaintiff's property rights without compensation and without due process of law.

5-e. Plaintiffs further say that the establishment of said highway, as aforesaid, at such an elevation as would grossly interfere with the operations of aircraft coming into and upon said airport and leaving same was accomplished by the defendants without any regard for the right of these plaintiffs and wholly out of consideration of the financial returns which the defendant seeks to earn from its operation of the toll road. That it was entirely feasible to construct and maintain said toll road at such an altitude as would not interfere with the operations of these plaintiff's business and in such a location and in such a manner as would not mitigate or cause the destruction of these plaintiff's business as herein set out. That the officers of the defendant were called upon and advised that the manner of construction of the said toll road and at the elevation aforesaid and in the location aforesaid, would interrupt these plaintiff's business to a great extent and cause them great [fol. 15] and irreparable damage all of which the defendant corporation, its officers and agents disregarded and have paid no heed.

5-f. That the plaintiffs have ascertained through sound and certain calculations based upon their business records, (which information will be furnished the defendant is request). That if the defendant is permitted and is allowed and does maintain the aforesaid toll road, in the manner aforesaid, in the location aforesaid, they will cause these plaintiffs great and irreparable damage in the sum of $3,016,950.79.

6.

Plaintiff's Allegations of Its Rights Herein

6-a. Plaintiffs now allege and say, that in the premises as herein stated, they are entitled to an order herein restraining and enjoining the defendant from maintaining said toll road in the manner as these plaintiffs herein

set out and all to their great and irreparable damage as herein set out.

Prayer and Demand

Wherefore and by reason of the above and foregoing, these plaintiffs pray the court for an injunction herein, enjoining and restraining the defendant from maintaining said toll road in such a manner and in the location aforesaid and in the altitude and at the height aforesaid and in such a manner as to destroy the established business of these plaintiffs, costs of this action and for all other relief, just and equitable in the premises.

[fols. 16-44] Paragraph II

Damages

Comes now the plaintiffs herein and for their second and further paragraph of complaint herein, incorporate and by reference, make a part hereof, all of plaintiff's first paragraph of complaint herein contained under the headings 1, 2, 3, 4, and 5.

And now the plaintiffs say that in the premises herein set out, the defendant will cause these plaintiffs to suffer great loss by destruction of their business, all to the damage in the sum of *$3,016,950.79*.

Wherefore plaintiffs pray they have judgment against the defendant in the sum of *$3,016,950.79*, costs of this action and all other relief just and equitable in the premises, and that the issues herein be submitted to a jury.

Straley Thorpe, Attorney for The Plaintiffs.

[fol. 45]

IN THE LAKE CIRCUIT COURT OF LAKE COUNTY, INDIANA

Cause No. C56-605

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

SUPPLEMENTAL PARAGRAPH OF MEMORANDA TO PARAGRAPHS I AND II OF DEFENDANT'S DEMURRER TO PLAINTIFFS' COMPLAINT

Comes now the defendant and having secured leave of Court, now files the following supplemental paragraph to its memorandum in support of Paragraph I and Paragraph II of defendant's demurrer heretofore filed in this cause.

The plaintiffs' complaint alleges that the City of Gary by ordinance, established an airport commission and expended large sums of money in acquiring lands for an airport; that this ordinance included the Gary airport zoning map which defined and described the boundaries of the airport, and limited the height of structures within six miles of the airport. (Paragraphs 1, 2, and 3a-3j.)

The plaintiffs' complaint further alleges that thereafter plaintiffs leased the airport or parts thereof from the City of Gary, and that thereafter the defendant, with knowledge of this zoning ordinance and of this lease, located a part [fol. 46] of the Indiana East-West Toll Road along and parallel with the southerly side of the airport, in violation of the zoning provisions of the aforesaid ordinance, thereby causing damage to plaintiff. (Paragraphs 3k, 5b, 5c, 5d, 5e, and 5f.)

The plaintiffs therefore as lessees of the Gary Municipal Airport claim an alleged easement right in the air above the Toll Road located south of the Gary Municipal Airport.

The enactment of said zoning ordinance by the City of Gary was, as a matter of law, an act done in the exercise of said City's police power pursuant to a delegation of said police power by the State of Indiana to said city by virtue of the Airport Act of 1945. (Acts 1945, ch. 190, as amended; Burns Ind. Stat., Sec. 14-413 et seq.) The enactment of said zoning ordinance constituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States. (See Law of Zoning, Metzenbaun, ch. IV-b, and cases therein cited.) The enactment of said zoning ordinance did not create any vested right to the City of Gary, but rather it created a restriction on the use of property surrounding the airport, subject to change by the city or the state in the reasonable exercise of its police power.

Therefore, when plaintiffs leased part of the airport from the City of Gary, they could not, by virtue of said lease, [fols. 47-48] have acquired any vested property right in the air south of the airport based on said zoning ordinance because the city itself had no such property right to lease to plaintiffs. The plaintiffs therefore acquired no such property right, by virtue of their lease with the City of Gary, which could not be taken away by a governmental body acting in the reasonable exercise of its politic power. The defendant, a duly constituted body politic in the state of Indiana, was, in locating said Toll Road along and parallel to the southerly side of said airport, acting as such a governmental body in the exercise of its politic power. Plaintiffs' complaint fails therefore to state the cause of action.

Indiana Toll Road Commission, By Charles N. Cook, General Counsel; Raymond R. Pyatt, Assistant General Counsel; William J. O'Connor, Resident Attorney.

[fols. 49-50]
IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

No. 16619

NICH JANKOVICH and PAUL JANKOVICH, doing business as CALUMET AVIATION COMPANY

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation

ORDER OVERRULING DEMURRER—November 26, 1957

The court having heretofore taken under advisement defendants demurrer to plaintiff's complaint, does now reconsider and overrule said demurrer as to both paragraphs of plaintiff's complaint.

G. L. Burns, Judge Porter Circuit Court.

[fol. 51]

[File endorsement omitted]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

Cause No. 16619

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

DEFENDANT'S ANSWER—Filed February 7, 1958

Paragraph I

Comes now the Indiana Toll Road Commission, defendant in the above entitled cause, and for answer to plaintiffs' complaint alleges and says:

1. That defendant admits the allegations contained in rhetorical paragraph 1 of plaintiffs' complaint.

2. That defendant admits the allegations contained in rhetorical paragraph 2 of plaintiffs' complaint.

3. 3-a. That defendant admits the allegations contained in sub-paragraph 3-a, rhetorical paragraph 3 of plaintiffs' complaint;

3-b. That defendant admits the allegations contained in sub-paragraph 3-b, rhetorical paragraph 3 of plaintiffs' complaint;

3-c. That defendant admits the allegations contained in sub-paragraph 3-c, rhetorical paragraph 3 of plaintiffs' complaint;

[fol. 52] 3-d. That defendant is without information in respect of the allegations contained in sub-paragraph 3-d, rhetorical paragraph 3 of plaintiffs' complaint;

3-e. That defendant is without information in respect of the allegations contained in sub-paragraph 3-e, rhetorical paragraph 3 of plaintiffs' complaint;

3-f. That defendant is without information in respect of the allegations contained in sub-paragraph 3-f, rhetorical paragraph 3 of plaintiffs' complaint;

3-g. That defendant denies the allegations contained in sub-paragraph 3-g, rhetorical paragraph 3 of plaintiffs' complaint;

3-h. That defendant denies the allegations contained in sub-paragraph 3-h, rhetorical paragraph 3 of plaintiffs' complaint;

3-i. That defendant is without information in respect of the allegations contained in sub-paragraph 3-i, rhetorical paragraph 3 of plaintiffs' complaint;

3-j. That defendant is without information in respect of the allegations contained in sub-paragraph 3-j, rhetorical paragraph 3 of plaintiffs' complaint;

3-k. That defendant denies the allegations contained in sub-paragraph 3-k, rhetorical paragraph 3 of plaintiffs' complaint;

3-l. That defendant is without information in respect of the allegations contained in sub-paragraph 3-l, rhetorical paragraph 3 of plaintiffs' complaint.

4. 4-c. That defendant denies the allegations contained in sub-paragraph 4-c, rhetorical paragraph 4 of plaintiffs' complaint;

[fol. 53] 4-d. That defendant is without information in respect of the allegations contained in sub-paragraph 4-d, rhetorical paragraph 4 of plaintiffs' complaint;

4-e. That defendant is without information in respect of the allegations contained in sub-paragraph 4-e, rhetorical paragraph 4 of plaintiffs' complaint.

5. 5-a. That defendant denies the allegations contained in sub-paragraph 5-a, rhetorical paragraph 5 of plaintiffs' complaint;

5-b. That defendant denies the allegations contained in sub-paragraph 5-b, rhetorical paragraph 5 of plaintiffs' complaint;

5-c. That defendant denies the allegations contained in sub-paragraph 5-c, rhetorical paragraph 5 of plaintiffs' complaint;

5-d. That defendant denies the allegations contained in sub-paragraph 5-d, rhetorical paragraph 5 of plaintiffs' complaint;

5-e. That defendant denies the allegations contained in sub-paragraph 5-e, rhetorical paragraph 5 of plaintiffs' complaint;

5-f. That defendant denies the allegations contained in sub-paragraph 5-f, rhetorical paragraph 5 of plaintiffs' complaint.

6. 6-a. That defendant denies the allegations contained in sub-paragraph 6-a, rhetorical paragraph 6 of plaintiffs'

complaint, and defendant further denies that plaintiffs are entitled to the relief prayed for in their complaint.

[fol. 54] Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph II

1. The plaintiffs, having incorporated into their Paragraph II of complaint rhetorical paragraphs 1, 2, 3, 4, and 5, the defendant now admits such portions as are heretofore admitted under Paragraph I of this answer, and denies such portions as are denied under Paragraph I of this answer, and alleges that it is without information as to such portions of Paragraph II as defendant alleges it was without information in Paragraph I of this answer.

Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph III

Comes now the defendant and for a third paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of the above entitled cause of action, defendant paid the claim and demand sued upon by plaintiffs in their complaint.

2. That on or about the 26th day of August, 1955, defendant and City of Gary, Indiana, a municipal corporation, and the Board of Aviation Commissioners of the City of Gary entered into an agreement, a copy of which agreement is attached hereto, made a part hereof, and identified as Exhibit A. That said agreement included, among other things:

[fol. 55] "Solution of Airport Problem

"'Said proposed route in the vicinity of Gary's Municipal Airport shall be rerouted sufficiently to the south thereof so that a fifty to one gliding angle shall exist to the present

NW-SE runway, as extended on said Airport Master Plan on the basis of said runway being elevated twelve (12) feet above existing ground level at its SE terminus. A part of the overall monetary damages provided in Paragraph 13 hereof represents damages to Gary resulting from the elevation of said runway when, as and if the same is extended. This will require a location of the route in the immediate vicinity of the crossing of U. S. 12 and Clark Road, thus carrying the Toll Road south of the Grand Calumet River and along the north boundary of the Gary Sewage Disposal Plant, and will require the straightening of the Grand Calumet River at this point."

That by the terms of said agreement defendant agreed to pay to the City of Gary, Indiana on its behalf on behalf of the plaintiffs, the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), and pursuant to said agreement, defendant did pay to said City of Gary, Indiana on its own behalf and as agent of plaintiffs the sum of One Million Four Hundred Thousand Dollars ($1,400,000.00) at the time of execution of said agreement as aforesaid; that defendant is ready, willing and able to pay to said City of Gary, Indiana the balance of said consideration in the sum of One Hundred Thousand Dollars ($100,000.00) when, as, and if said City of Gary, Indiana conveys to said defendant Indiana Toll Road Commission certain real estate mentioned in said agreement, which real estate, however, excludes the real estate alleged by plaintiffs to be under lease to them from the City of Gary, Indiana.

Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph IV

[fol. 56] Defendant for fourth paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of the above entitled cause of action, plaintiffs entered into a certain lease agreement with the City of Gary, Indiana, dated the 23rd day of March, 1950, which lease agreement is attached hereto, made a part hereof, and identified as Exhibit B.

2. That pursuant to the terms and provisions of said agreement contained in Article VIII, paragraph 6, subparagraph (d) thereof, said lease agreement provides:

"...

"It is further agreed that all grants, rights and privileges under the Standard Fixed Base Operators Ground Lease Agreement, shall be subject to all present and future laws, rules and regulations of the local, State and Federal government or of any lawful agencies thereof."

3. That said lease was made pursuant to Acts, Indiana General Assembly 1945, Chapter 190, Sections 1-7 both inclusive as amended, Acts 1947, Chapter 73, Sections 1-3, as amended, Acts 1949, Chapter 109, Section 3, and by the terms and provisions of said acts aforesaid the right of action, if any, is vested solely in the Board of Aviation Commissioners of the City of Gary, Indiana, a municipal corporation, and any action must be brought in the name of the City of Gary, Indiana growing out of any alleged violation of said act as to the regulation, control or interference with air space above or surrounding any such airport or landing field; if by reason of the premises plaintiffs are not the real party in interest in this action.

Wherefore, defendant asks judgment for costs.

[fol. 57] Defendant's Answer

Paragraph V

Defendant for fifth paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of this action, plaintiffs and the City of Gary, Indiana entered into a certain lease agreement dated the 23rd day of March, 1950, copy of which is attached hereto, made a part hereof, and identified as Exhibit B; that subsequently defendant entered into a settlement contract with the Board of Aviation Commissioners of the City of Gary, Indiana, which settlement

agreement is made a part hereof, and identified as Exhibit A.

2. That during the negotiations leading up to the execution of said settlement agreement identified as Exhibit A, and at the time of execution of said agreement, plaintiffs were consulted by the members of the Board of Aviation of the City of Gary, Indiana and by the Mayor of the City of Gary, Indiana, and were fully apprised of the terms and conditions of said settlement agreement identified as Exhibit A, but that throughout said transaction plaintiffs failed and refused to make known to this defendant, the City of Gary, Indiana, or the Board of Aviation Commissioners the alleged claims sued on in their complaint. By reason of the premises plaintiffs are estopped and precluded from now making or asserting the claims and demands sued on in their complaint.

Wherefore, defendant asks judgment for costs.

[fols. 58-243] Charles W. Cook, Jr., Geo. A. Purvis, 309 West Washington Street, Indianapolis 4, Indiana;

Chester, Clifford, Hoeppner & Houran, Farmers State Bank Building, Valparaiso, Indiana;

Galvin, Galvin & Leeney, 7th Floor Calumet Building, Hammond, Indiana,

Attorneys for Indiana Toll Road Commission.

[fols. 244-366]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

No. 16619

NICK JANKOVICH and PAUL JANKOVICH, doing business as CALUMET AVIATION COMPANY

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation

JUDGMENT—October 1, 1960

This cause having heretofore been taken under advisement, the court now finds for the defendant on paragraph one of the complaint and judgment for defendant denying an injunction against the defendant. The court now finds for the plaintiff on paragraph 2 of plaintiff's complaint and awards judgment for plaintiff in the sum of $164,000.00 and costs.

It Is, Therefore, Ordered, Adjudged and Decreed by the court that the plaintiff, Nick Jankovich and Paul Jankovich, doing business as Calumet Aviation Company, do have and recover of and from the defendant, Indiana Toll Road Commission, a Corporation, the sum of $164,000.00 plus the costs and accruing costs of this action.

Alban M. Smith, Special Judge.

[fols. 367-370]

[File endorsement omitted]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

Sitting at Valparaiso, Indiana

Cause Number 16619

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

DEFENDANT'S BILL OF EXCEPTIONS NUMBER 1, CONTAINING THE EVIDENCE—Filed December 6, 1961

Be It Remembered, That on the 22nd day of March, 1960, it being the 44th day of the February Term, 1960 of the Porter Circuit Court, Honorable Alban M. Smith, Special Judge in said cause presiding, the following proceedings were had in this cause; and the cause being at issue, and without the intervention of a jury, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

* * * * * * *

[fol. 371] And PAUL JANKOVICH, one of the plaintiffs and a witness on behalf of plaintiff, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

[fols. 372-375] Q. From the time you started, from the time you learned to fly in 1933, when did you get into the aviation business as a business?

A. In 1932.

Q. And where was that?

A. That was on the old Gary Airport on 61st and Broadway.

* * * * * * *

[fol. 376] Q. Now, Mr. Jankovich, I will ask you when it was that you moved to the Gary Municipal Airport—that is, the new airport?

[fol. 377] A. We officially moved, I think, in 1950.

Q. Permit me to ask you this: from all this experience you have related with respect to aircraft, in the flying of aircraft and the handling of it, I will ask you if you are familiar with what is termed "glide angle", you understand what that means?

A. Yes, I am very familiar with that.

Q. And I will ask you also if you are familiar with those procedures which are usually adopted and used by pilots skilled in the profession with respect to safety factors and handling in the flying of these aircraft?

A. Yes; I am.

Q. So as I understand it, from your knowledge you are able to state with accuracy what may or may not be safe with respect to the industry, your opinion as to what may or may not be safe, and state the basis of your opinion?

* * * * * * *

A. Yes.

* * * * * * *

[fols. 378-396] Q. Mr. Jankovich, I will ask you what the fact is as to whether or not you moved over to what is now known as the Gary Municipal Airport, moved your business?

A. Yes.

Q. When was that?

A. 1950.

Q. Now I will ask you, what is the fact as to whether you entered into—without stating what they are—you and your brother entered into any contractual relationship or obtained any leasehold from the City of Gary upon the tract of land which is now known as Gary Municipal Airport?

A. Yes, we did.

Q. And pursuant thereto, as I understand it, you moved over onto the airport and established the business which you have now there?

A. That is correct.

• • • • • • •

[fol. 397] The Court: As I understand it, exhibit number 1 is an exemplified copy of an ordinance adopted October 25, 1939 based upon a 1929 act, and the objection to the introduction and the acceptance of that exhibit as part of the evidence is this: the acts of 1945 repealed the acts of 1929 and by reason of that this ordinance is immaterial and the exhibit is not embraced within the issues set out in the complaint, having reference to the lease that is executed and set out in the complaint under the acts of 1945.

Mr. McMahan: Plus the further grounds, it varies with the pleadings as they allege the creation of an aviation commission in 1949.

The Court: I am going to admit that provisionally because it may have something to do with the overall pic-[fol. 398] ture here. I can see there is a possibility it might be immaterial as I look at it now, but there may be something develop later on that might make it material. Based upon that reservation I will let it go into evidence at this time.

• • • • • • •

[fol. 399] The Court: Now as to plaintiffs' exhibit number 2—

• • • • • • • •

The Court: I believe I will let it go in.

• • • • • • • •

[fols. 400-406] Mr. McMahan: If the Court please, the defendant will object to the admission in evidence of plaintiffs' exhibit number 3, the purported ordinance of the City of Gary, Indiana for the following reasons separately and severally:

• • • • • • • •

[fols. 407-474] Mr. McMahan: I think the reporter's record should show that plaintiffs withdrew their offer of plaintiffs' exhibit 3.

• • • • • • •

[fol. 475] Q. Now, Mr. Jankovich, do you recall when the Toll Road was constructed in proximity to the Airport?

A. To the best of my knowledge I would say it was the end of 1956, in that area.

Q. When was the complaint filed?

Mr. McMahan: July 26, 1956.

A. It must have been after that because it wasn't completed until after the filing of the lawsuit.

Q. Now, Mr. Jankovich, previous to July 26, 1956 I will ask you what is the fact as to whether you were occupying the premises known as the Gary Municipal Airport?

A. We were.

Q. And when did you go in there?

A. We went in there the first part of 1950.

Q. Now as part of the improvements of the Airport what if anything did you furnish yourselves or what did you build there?

[fol. 476] A. We built the large aircraft hangars and the small aircraft hangars and the small gasoline bulk plant.

* * * * * * *

Q. Now with reference to the airport, where was the Toll Road constructed?

A. It was constructed along the south boundary of the airport.

* * * * * * *

Q. As you understand, the river was approximately the south boundary of the airport?

A. Approximately, as I understand it.

Q. When the Toll Road was constructed I will ask you what if any buildings were located on the airport that you had put up there or that you had built there?

A. It is all the buildings that are there at the present time which consisted of two large storage hangars with a [fol. 477] shop area in between and an office extension on one side; three rows of "T" hangars; that are the only buildings that were constructed.

Q. What if any signs or indications were there on the field which would indicate you were in possession of the premises?

A. Well, our name was inscribed in large letters, our business name, on a hangar.

Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 9.

(Photograph referred to marked by reporter for the purpose of identification, plaintiffs' exhibit number 9.)

Q. Mr. Jankovich, I hand you what has been identified as plaintiffs' exhibit number 9 and ask you to examine it, and having done so, I will ask you to tell us if you recognize the subject matter of that photograph?

A. Yes, I do.

Q. And what is it?

A. This is a photograph of the large hangars we have erected that were the same in 19—

Q. Just a minute. He will be objecting to you not being responsive. With respect to that photograph I will ask you if the signs which appear on the hangars were there before the Toll Road was constructed in 1956?

A. The sign that appears on the front was there at the time.

Q. How about the one on the side?

A. The one on the side was painted in the last few years; I think it was after the Toll Road.

Q. But aside from the sign which says "Gary Municipal [fols. 478-510] Airport" that is a true picture of the hangars and the sign as they appeared before the Toll Road was built, is that right?

A. That is right.

Q. Do you now recall approximately when the Toll Road was completed?

A. I think it was completed in the late fall or early winter of 1956—it was completed in late 1956 or 1957, I don't recall.

* * * * * * *

[fol. 511] Q. Now, Mr. Jankovich, calling your attention to, just previous to the time the Toll Road was constructed, I will ask you what was the extent of the improvement by way of runways which existed on this Gary Airport?

* * * * * * * *

A. The improvement over the original layout, there was an extension made on two ends of one runway.

* * * * * * * *

Q. Do you recall when the Toll Road was built?
A. I believe I do.
Q. When was it?
A. It was built during the latter part of 1956. It took a year to build. It is in that area, 1956 and the first part of 1957.

• • • • • • •

[fol. 512] Q. With respect to the year 1955 I will ask you now to describe what the extent of the construction of the north-south runway was.
A. The length, you mean?
Q. Yes.
A. 3,600 feet.
Q. And what was the length of the east-west runway?
A. 4,600 feet.

• • • • • • •

Q. You have described the length of the two runways. What is the fact as to whether taxi-ways had been constructed?
A. Taxi-ways were constructed parallel to both runways.
Q. And what would be the extent of those taxi-ways?
A. They would be the same length as the runways with little cross-overs to get to them.
Q. Where did they originate and end?
A. They originated on one end of one runway and ended on the end of the same runway.
Q. That is rather indefinite. Tell us where the taxi-ways started and where they ended up.

• • • • • • •

[fol. 513] A. The taxi-ways parallel the runways, then they are extended to the hangar area.
Q. How many runways were there on this airport that had been constructed in 1955?
A. Two.
Q. And with respect to the present date has there been any change in the construction of those runways?

• • • • • • •

A. Not since 1955 there were no extra runways, but the construction was repaved without any length being added;

just the repaving the way they were, the runways, taxi and parking ramp.

Q. What was the length of the north-south runway in 1955, if you know?

A. 3,600 feet.

Q. And what is its length today?

A. 3,600 feet.

* * * * * * *

"Q. Now at the time you executed plaintiffs' exhibit num-
[fols. 514-515] ber 4 do you now recall what the proposed extent of the north-south runway was?")

* * * * * * *

A. The proposed runway was to extend 3,900 feet.

* * * * * * *

[fol. 516] Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 9 and I will ask you what the fact is as to whether that exhibit is a reasonably correct photograph of the things—the subject matter that is shown in it with respect to the hangars as they existed at the time the Toll Road was constructed?

A. It is.

Mr. Thorpe: We now offer in evidence plaintiffs' exhibit 9, your honor, please.

* * * * * * *

[fols. 517-518] The Court: The exhibit may go in. It may be admitted in evidence.

* * * * * * *

[fols. 519-520] Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit number 11 and ask you to examine it, and having examined it I will ask you just to tell us what it is and not describe the contents.

A. This is an aerial view of our installation at the Municipal Airport.

Q. And with reference to when the Toll Road was constructed I will ask you whether that is a reasonably accurate representation of the improvements upon the airport as they existed at that time?

A. It is.

* * * * * * *

[fol. 521] Q. Now, Mr. Jankovich, I hand you again plaintiffs' exhibit 11 and indicating thereon what appears to be the hangars on the east side of the ramp: I will ask you to describe generally what the size of those hangars are?

A. There are two large hangars that have been abutted, are side by side, and each of the two measures 120 feet square. Between the two we have a shop area of 40 by 120. On the south end we have an office section 20 by 120, which gives us an overall building under one cover of 120 feet by 300 feet.

Q. And I will ask you who built and paid for that hangar?

A. My brother Nick and I built and paid for it.

Q. Now indicating three buildings here—long buildings that appear to be just west of the main hangars, I will ask you to tell us what those are?

A. Those are what is known as nested T hangars. They house smaller aircraft, and we have three rows of ten each.

Q. How many aircraft will those hangars house?

A. Each hangar row will house ten, so three would house thirty.

Q. Mr. Jankovich, I will ask you who built and paid for those hangars?

A. My brother Nick and I built and paid for them.

Q. Now indicating in the picture what appears to be a runway extending north and south on this picture, I will ask you what, in truth and in fact, that is?

A. That is the end of the north runway as it existed since about 1954 or 1955.

Q. You say "the north runway." What designation does [fol. 522] that runway have?

A. The true number, as we refer to runways rather than directions—we refer to numbers—this would be 2-20; 2 in one direction and 20 in the other direction.

Q. With respect to the vernacular and the general direction, how would you describe that runway?

A. This runway limited to the northerly direction would be classified as 20 degrees, and limited in the southerly direction it would be classified as 200 degrees.

Q. Generally this is the north-south runway?

A. We refer to it as north-south runway.

Q. Now I will ask you with reference to your testimony yesterday that was the runway you told us was originally designed for approximately how many feet?

A. The Master Plan called for 3,900 feet.

* * * * * * *

Q. You testified yesterday that was designed for a length of so many feet; I believe it was—

A. It was 3,900.

* * * * * * *

The Court: He testified 3,900. It was 3,600, and proposed 3,900.

* * * * * * *

[fol. 523] Q. Now, Mr. Jankovich, will you please describe the location of this airport with respect to the township in which it is located? First, what township is the Gary Airport located in?

A. Calumet Township.

Q. And with reference to downtown Gary where is it located?

A. From the center of downtown Gary to the center of the Airport it is approximately three and a half miles to the west.

* * * * * * *

Q. Can you definitely locate the Airport within Calumet Township now by other objects?

A. Yes.

Q. All right, will you do so?

A. Well, the Airport is bounded on the north by U. S. Highway Number 12; bounded on the west by the E. J. & E. Railroad; bounded on the south by the Grand Calumet River, forming a triangle.

Q. And approximately how many acres are there in this Airport?

A. Approximately 610.

Q. Now, Mr. Jankovich, with reference to the metropolitan area tell the court what direction it is from the City of Chicago?

[fol. 524] A. It is southeast of the City of Chicago.

Q. And about how far?

A. Twenty miles from the center of downtown Chicago.

Q. And with respect to Milwaukee where is it located?

A. It is 100 miles south.

Q. And with respect to South Bend where is it located?

A. West of South Bend approximately 55 miles.

Q. And with respect to Benton Harbor and St. Joseph where is it located?

A. About 65 miles southwest.

Q. And with respect to Michigan City where is it located?

A. West about twenty-five miles.

Q. And Valparaiso?

A. Northwest twenty miles.

Q. And Hammond, Indiana?

A. It is about seven or eight miles east—or northeast of Hammond.

Q. What if any military installations you know may be located within the near proximity of this Airport?

A. There is a military installation located on the Airport proper.

Q. And where is it?

A. It is on the west end of the Airport, and they have one small part of that installation on the south end.

Q. What is the nature of those particular installations?

A. It is a Nike anti-aircraft missile base.

Q. Now within the near vicinity of this Airport I will ask you what if any other military installations you know of that exist?

[fol. 525] A. South of the Airport, if you call that near vicinity, about five miles there is another Nike missile base.

Q. With reference to Lansing, Illinois I will ask you how far Lansing is from the Airport?

A. Lansing is approximately nine or ten miles southwest.

Q. Do you know what if any military installations are located there?

A. Yes.

* * * * * * *

Q. What did you say?

A. You asked me if there were any other installations at Lansing and I said yes.

Q. What does that consist of?

A. They have another Nike anti-aircraft missile base, and the Illinois National Guard is based there. I should qualify that and say the aircraft buildings of the Illinois National Guard are based at Lansing.

Q. What is the fact as to whether there is any military aircraft on the Gary Municipal Airport itself?

A. Yes, there are.

Q. What does that consist of?

[fols. 526-527] A. We have military aircraft owned by the Indiana National Guard that is based there all the time.

Q. Now, Mr. Jankovich, calling your attention to the 23rd day of March, 1950—that is the date of the execution of the Fixed Base Contract—I will ask you to describe at that time what installations had been negotiated on the Airport at the time of the execution of that contract?

A. Do you mean physical facilities of the Airport?

Q. Yes. On the date of the execution of the contract what had been negotiated with respect to the construction of the Airport?

A. The Airport had been graded and drained and runways had been built, and parking ramps.

Q. Do you know who had paid for that construction?

A. The federal government and the City of Gary in conjunction paid for it.

Q. With respect to any other work that had been done there previous to the execution of these contracts on the 23rd day of March, 1950, can you relate any others?

A. Previous to that date the section of the ground had been leveled and drained; some foundations had been put in by the War Assets Administration. They were going to use that area for a synthetic rubber plant. Then that was abandoned and it was deeded back to the City of Gary. And from that time on the federal government and the City had matched funds in the improvement of the Airport.

* * * * * * *

[fol. 528] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 12.

(Photograph referred marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 12.)

Q. Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 12 and ask you to examine it and without particularly describing it I will ask you this exhibit is?

A. This is a photograph facing south off of the end of the south runway.

Q. Now you say "south runway." You mean north-south runway?

A. Looking south off the end of the north-south runway.

Q. And with reference to when the Toll Road was constructed was that view taken before or after?

A. After the Toll Road was constructed.

Q. Now I take it this in the bottom is the south end of the runway, is that correct?

A. That is correct.

Q. That is the present runway?

A. That is correct.

Q. Now with respect to the end of this runway can you tell us approximately how far it is over to the Toll Road?

• • • • • • • •

[fol. 529] A. The approximate distance from the end of the north-south runway—the distance from the end of the north-south runway to the Toll Road is approximately a thousand and forty or fifty feet.

• • • • • • • •

A. I would like to correct the distance I gave: rather than 1040 or 1050 feet I would like to correct it to approximately 800 feet.

• • • • • • • •

Q. Mr. Jankovich, again referring to plaintiffs' exhibit [fols. 530-531] 12 would you be able to tell us when the photograph was taken: do you know?

A. I don't know the exact date. I would say it was taken this year. There haven't been any changes since the Toll Road was built until now, so it was taken in that period of time.

Mr. Thorpe: Do you have any other question with respect to it, Mr. McMahan?

Mr. McMahan: No.

The Court: It may be admitted in evidence.

• • • • • • •

[fol. 532] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 13.

(Photograph referred to marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 13.)

• • • • • • • •

Q. Let's go back and start over again. Where was this picture taken from?

A. That picture was taken 600 feet south of the end of the north-south runway.

[fol. 533] Q. The south end?

A. About 600 feet south of the south end of the north-south runway.

Q. Now with reference to the Toll Road, tell us approximately how far the camera was from the Toll Road?

A. Approximately 200 feet.

Q. And which direction from the Toll Road?

A. It would be north of the Toll Road looking south. The picture was taken looking south.

Q. Now with respect to any changes which might have been made from the time the Toll Road was built, is this an approximate depiction of the matters set out in the photograph as of the time when the Toll Road was constructed?

A. This is practically the exact condition that existed when the Toll Road was constructed.

Q. Now with respect to animate objects, or the tr[illegible] that appear in this photograph, do you know where those trucks are located in the photograph?

A. They are traveling on the Indiana East-West Toll Road; they are heading in a westerly direction.

Q. And on what side of the Toll Road?

A. They are on the north side of the Toll Road going west.

Mr. Thorpe: We offer in evidence plaintiffs' exhibit number 13. If you have any questions, Mr. McMahan, you may ask him.

* * * * * * *

[fols. 534-535] The Court: It may be admitted in evidence.

* * * * * * *

[fol. 536] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 14.

(Photograph referred to marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 14.)

Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 14 and ask you to examine it, and after having done so I will ask you first what generally the subject of that photograph is?

A. This is an aerial view looking north from the south approach end of the north-south runway.

Q. Obviously that was taken from an airplane, is that right?

A. That is correct. The top view shows part of the wing of the airplane.

Q. Who was flying the plane?

A. I was flying it.

Q. Now with respect to the height at which the airplane must fly at the time the photograph was snapped, will you tell us how high it was?

A. I would approximate about 100 feet.

Q. I will ask you this is that appears to be a railroad in the foreground of this exhibit?

A. That is the roadbed of the South Shore Railroad.

Q. Now with respect to the roadbed of the South Shore Railroad, how far south were you flying at the time you took this photograph, approximately?

A. I would have to approximate about 300 feet.

Q. Now between what appears to be the north-south runway and the railroad, I will ask you what appears in this photograph?

[fol. 537] A. Well, it is an elevated section of roadway which is the East-West Indiana Toll Road.

Q. Now I will ask you if this photograph substantially

represents the physical features as they obtained at the time the Toll Road was constructed?

A. It does.

Q. Do you recall about when this photograph was made?

A. That photograph was taken in the summer time according to the leaves of the vegetation, and so forth, and I would say it was probably taken last summer sometime, probably in the summer of 1959.

Q. Now particularly with respect to the background here, the background in the right side of the photograph, I will ask you what appears in that?

A. In the right background the hangars we have built on the Municipal Airport appear.

Q. All of them?

A. As much as can be seen on the T hangar side. Some are blocked by the front hangar. The other hangars are fairly well distinguishable.

Q. With respect to the runway, I understand this picture discloses the runway as it was at the time the Toll Road was constructed, is that right?

A. That is right.

Mr. Thorpe: We offer in evidence plaintiffs' exhibit number 14.

. . . . . .

[fol. 538] Voir dire examination.

By Mr. McMahan:

Q. Mr. Jankovich, looking at plaintiffs' exhibit 14 I notice what appears to be a white line or something between the south end of the north-south runway and the Toll Road, and I will ask you if you know what that is?

A. Yes, I believe I do.

Q. What is that white line; what does it represent?

A. That is a little temporary road used for vehicles to go around the end of the runway.

. . . . . .

Q. What kind of vehicles?

A. Well any vehicles, but mostly used by military vehicles.

Q. What is the construction of that road?

A. The last time I saw it—it was a dirt road at first; now I think they have some stone on it, stone or slag.

• • • • • • •

[fols. 539-540] The Court: It may be admitted in evidence.

• • • • • • •

[fol. 541] Direct examination resumed.

By Mr. Thorpe:

Q. Now, Mr. Jankovich, with respect to the original installation of the north-south runway I will ask you what the first development of that runway was, the length of the first development?

A. The first length was 3,100 feet.

Q. Now I will ask you with respect to that length of runway and ask you to tell me from your experience as a pilot as to whether that runway, located as it was, was adequate for all classifications of aircraft?

• • • • • • •

A. I would say 3,100 feet could not handle all types of aircraft.

Q. What is the fact as to whether that construction, 3,100 feet, was laid down previous to the construction of the Toll Road?

A. Yes, that was the first installation.

Q. What if anything was done with respect to this runway for the purpose of improving its utility as a runway [fol. 542] for the use of all types of aircraft?

A. The runway was extended to make it suitable for all types of aircraft.

Q. And how far was it extended; to what extent?

A. It was extended 500 feet to a total length of 3,600 feet.

Q. And with respect to the construction of the Toll Road when was that done?

A. That was done previous to the Toll Road, I believe, several years.

• • • • • • •

Q. Mr. Jankovich, you have just told us that the original layout of the runway was not adequate for all classes of aircraft, in your opinion. You said the runway was extended. Now what else, if anything, was being done with respect to improving the utility of this runway?

* * * * * * *

[fol. 543] A. At that time negotiations were being made with the South Shore Railroad to remove a temporary obstruction to make that runway more usable.

Q. Do you know what height the obstruction over the South Shore Railroad would have been after the improve-

[fol. 544] ment or the removal that you were talking about?

A. Yes.

Q. And what would it have been?

A. It would have been 24 feet above the roadbed.

Q. That is, the South Shore roadbed?

A. That is correct.

Q. Now, Mr. Jankovich, let me ask you this: in your experience as a pilot over past years, and your experience in the army, and with respect to heavy aircraft, particularly any aircraft over a weight of 15,000 pounds gross, I will ask you what you consider to be a reasonably safe glide angle for taking off and landing such aircraft?

* * * * * * *

A. I consider a 40 to 1 glide angle to be reasonable and safe.

* * * * * * *

[fol. 545] Q. Now, Mr. Jankovich, I will ask you this question: Do you know the reason why the obstructions at the South Shore Railroad was not cut down or removed; do you know why?

A. Yes.

Q. Why?

A. After the intrusion of the Toll Road there was no necessity to cut them down because the hazard was greater than what was there originally.

Q. The hazard created by what?

A. By the Toll Road.

Q. Mr. Jankovich, with respect to this runway where

were the hazards, if any, located previous to the construction of the Toll Road?

A. The hazards were south of the South Shore Railroad, which were—do you want me to elaborate what they were?

Q. Yes.

A. They were mainly temporary obstruction poles; mainly poles for obstruction lights, should we say, and some poles on the South Shore Railroad that were needlessly extended above their minimum height.

Q. As I understand it, that is what you were talking about in negotiating the reduction of them?

A. That is correct.

Q. Now that constituted a hazard before the Toll Road [fol. 546] was built, is that right?

A. That is right.

Q. After the Toll Road was built what if anything became a hazard for the runway?

A. The Toll Road itself with the traffic it bore over the road.

Q. Now just before the Toll Road was built, Mr. Jankovich, and having in mind the runway which had been improved by lengthening as you described it, I will ask you what categories or classifications of aircraft could reasonably use that runway, in your opinion?

A. Practically all aircraft, in my opinion.

Q. After the Toll Road was constructed at the height which it was constructed, I will ask you what would be your answer with respect to what classifications and categories of aircraft could use that runway?

A. The heavier multi-aircraft could not use it safely; it would have to be smaller type aircraft.

Q. Now let's particularly get into classifications which the court can understand. You say "heavier aircraft." Can you give me some dividing line between aircraft that could safely use that runway with the Toll Road there, and those which could not safely use it with the Toll Road there?

A. We use a general figure of 15,000 pounds and over, gross weight, are considered heavy aircraft; under 15,000 pounds gross weight are considered lighter aircraft.

Q. Now, Mr. Jankovich, after the Toll Road was built [fol. 547] there, I would like for you to describe to the

court in as simple language as you can, what kind of a hazard this Toll Road presented to a pilot attempting to take off over the top of it going to the south, in heavy aircraft. Now start off from the beginning and tell his honor in simple language so that he can understand.

A. Heavy aircraft, as stated, of heavy weight, naturally they take more of a run for taking off. Once they get off the ground their climb is very slow—by "climb" I mean in feet, not in forward speed. The forward speed is fast but their climb is very slow. Therefore, they must have a long enough runway with very limited obstruction so they could clear it safely.

Q. Now with respect to the elevation of the Toll Road, and as you know of it, as you approach—now I am referring to plaintiffs' exhibit 14, if your honor please—I will give it to you so you can follow it— Strike that question. Mr. Jankovich, assuming a south wind of fifteen knots—I think I had better change that. Assuming a south wind of approximately seventeen miles an hour—seventeen to eighteen miles an hour, assuming you are the pilot of an aircraft, say, of 30,000 pounds gross weight: do you have in mind some aircraft about that size?

A. Yes.

Q. What would that be, for the purpose of this question.

A. The aircraft would probably be a Lockheed Ventura.

Q. All right. Now we will assume you are going to take off to the south in a seventeen or eighteen mile wind over [fol. 548] this Toll Road in a Lockheed Ventura. Now first where would you start?

A. I wouldn't start.

Q. That is a good answer. And why wouldn't you start?

A. Because I don't think the flight could be made safely in clearing the Toll Road.

Q. Now let's come down the line; let's assume an aircraft in the weight class of around 20,000 pounds gross. Now do you have in mind an aircraft of that weight?

A. Yes.

Q. And what would that be?

A. That would probably be a Lockheed Lodestar.

Q. Now having in mind a Lockheed Lodestar and as-

suming you were the pilot of that aircraft: —have you ever flown a Lodestar?

A. Yes, sir.

Q. And you are perfectly familiar with it, are you not?

A. Yes, sir.

Q. What type of aircraft is it?

A. It is a twin-engine aircraft of about a complement of fifteen or eighteen passengers.

Q. And the horsepower?

A. Usually they have 2,500 horsepower, combination of two engines.

Q. And gross speed?

A. Gross speed of approximately 200 miles an hour.

Q. Now we will assume you are going to— You say it is a Lodestar?

A. Yes, sir.

Q. You are going to take the Lodestar down to the north [fol. 549] end of the runway, and you have a seventeen or eighteen mile-an-hour wind out of the south, down the runway; what procedure would you use to get off?

A. I don't think that would be attempted—it couldn't be safely attempted.

Q. You couldn't open the throttle and start out?

A. No, it would be too much weight and too much risk.

Q. Now coming down to the lighter aircraft, say in the 15,000 pound class, do you have in mind a type of aircraft that would fit that roughly?

A. Well, roughly, there is what they call the Lockheed Electra and Lockheed 10—we will call it Lockheed 10 to keep it away from the jets.

Q. Lockheed 10, what is that equipped with?

A. That is equipped with 450 horsepower engine, a total of 900 horsepower.

Q. Generally what is that used for?

A. That is generally used for transportation of company personnel and things like that: light corporate—

Q. Light corporate personnel?

A. Light corporate personnel.

Q. And with respect to the value of one of those aircraft, what would be the approximate value of one of those?

A. The value when they are new would run about $100,000.00.

Q. Now we will assume for the purpose of this question that you are flying one of those Lockheeds, and you are flying it, an executive personnel of some class, and you go down to the north end of the runway and you are faced [fol. 550] with a seventeen or eighteen mile wind, now what would you do with respect to an attempt to get off on that runway?

A. It would be safe to take off.

Q. It would be safe?

A. Yes.

Q. Now with respect to classification of aircraft of lower weight, that is to say, a gross weight under 15,000 pounds, what would you say would be the fact as to whether they could use that runway safely, assuming a south take-off in a seventeen or eighteen mile wind?

A. The last aircraft I mentioned was under 15,000, so I would say anything under 15,000 could use it safely providing the equipment was in good condition.

Q. Now I want you to describe to the court, having in mind, Mr. Jankovich, a railroad with open obstructions such as poles or fences or something of that nature, and an obstruction which is solid, as is indicated by the construction of this Toll Road, with respect to plaintiffs' exhibit 13 and as disclosed by that exhibit. I will ask you if there is any difference, or any different particular characteristics that a pilot is faced with when he is attempting to negotiate those hazards?

A. Well—

Q. That calls for a "Yes" or "No" answer.

A. Yes.

Q. Now what may the difference consist of?

A. Well, it is common knowledge you can't go through a solid object such as an embankment or solid wall, whereas, electrical wires can be penetrated without substantial in- [fol. 551] jury to the personnel going through the wires. There may be damage to the under side if there is any other obstruction but wires can be flown through to a certain extent.

Q. So I understand what you are saying is, one is that the hazard presented by the South Shore here was of a different nature than that presented by the Toll Road?

A. It is possible to go through the wires without very much damage, whereas you can't go through a solid object. That is common knowledge. I am speaking mainly in emergency. You don't make it a practice to go through wires.

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[fol. 552] Q. Mr. Jankovich, having in mind the hazard and obstruction which existed before the Toll Road was built, along the South Shore Railroad, what if any atmospheric disturbance would be created by that sort of an obstruction?

A. The atmospheric disturbance would be very slight.

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[fol. 553] Q. Now, Mr. Jankovich, having in mind the construction of this Toll Road in the manner in which it was constructed, I will ask you what if anything about it besides its elevation would materially affect the glide path of aircraft seeking to come into or leave the north-south runway?

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[fol. 554] A. The obstruction of the Toll Road would create a turbulent air condition on both sides depending on which way the wind was blowing, on the takeoff in one [fol. 555] direction and the approach on the other, which I would like to explain.

Q. Go ahead and explain it; that is part of the question.

A. Now air has practically the same characteristics as water, as far as an explanation is concerned. When you have water flowing over a certain area and hits a great big obstruction, it goes over the top and creates a considerable turbulence. Air has the same characteristics. Water going across an area and flowing over a high obstruction will create a considerable turbulence on the opposite side. Air will do the same thing. Therefore, we always take off into the wind. So naturally on the south takeoff we have considerable turbulence of air before encountering the Toll Road, and this being a downward trend of air would have a tendency to keep the aircraft down; keep it from its normal flight. On the other hand, landing in the opposite

direction, the air would be hitting the Toll Road from the north creating a turbulence on the south approach. That would give the same turbulence and sinking of the airplane, so far as the Toll Road. So far as other obstructions are concerned, water flowing over a fence or posts or poles or wire, will go through with very little turbulence, but water going over a solid object will create quite a swirl and quite a turbulence. So air will act the same way.

Q. What would you or any other skilled pilot have to do to avoid—strike that. When an aircraft hits that turbulence, even though it may clear the obstruction, what is the hazard that affects the safe glide of the aircraft? [fol. 556] A. In the turbulent condition the turbulence is more of a down-draft and tends to settle the airplane towards the ground, where in its normal path it would go on undisturbed.

Q. Now a pilot approaching that sort of an obstruction and knowing that condition exists, where then would the safe glide angle be with respect to the obstruction—that kind of an obstruction?

A. Naturally the only safe way to do it would be come in at a higher altitude above the glide path and give safe clearance over the obstruction; but in turn it will shorten up the length of the runway you have left.

Q. Now with respect to the runway that you had, the north-south runway on the Gary Airport at the time the Toll Road was constructed and after it was constructed, and having in mind what you have just described, approximately how much of that runway then would be usable for aircraft?

A. Did you say before the Toll Road?

Q. After the Toll Road.

A. After the Toll Road we would probably have an actual usable length due to curtailment of our glide path of 3,000 feet left—3,000, around in that area, I should say.

Q. And with respect to the landing and takeoff of all classifications of aircraft would that be adequate?

A. No, sir.

Q. What classifications would it be adequate for?

A. It would be adequate for aircraft grossing under 15,000 pounds.

[fols. 557-560] Q. It would be?

A. Yes.

Q. And over that?

A. No.

Q. Now, as I understand it, you came on to the Airport—moved your business in 1950, is that right?

A. Yes.

Q. Now what classifications of aircraft were doing business with you then on this Airport?

A. We were usually at the beginning doing business with aircraft under 15,000 pounds.

Q. Now going forward up to the time that the Toll Road was constructed what classifications of aircraft were dealing with you by way of new business?

A. We were dealing mostly with aircraft over 15,000 pounds gross weight.

Q. When you say "dealing with them," what was the nature of your business with them?

A. Well, we were storing and servicing some of the large aircraft on the field, and we had a lot of transient aircraft that came in for refueling, and so forth.

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[fols. 561-569] The Court: Let plaintiffs' exhibit 4-b be admitted.

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[fols. 570-576] The Court: 4 and 4-a are admitted in evidence.

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[fols. 577-580] The Court: As you know, last night I took some exhibits home to study, together with the substance of the objections made by the defendant, and after studying the offered exhibits and considering the objections to the admission of plaintiffs' exhibits 6 and 7 into evidence, I am of the opinion that the exhibits ought to be admitted. Exhibits 5 and 5-a show that plaintiffs' exhibits 6 and 7 were negotiated at the time of the execution of plaintiffs' exhibit number 4 and were subsequently executed and then became a part of the general business operation. I believe the allegations of the complaint are broad enough to warrant the admission of plaintiffs' exhibits 6 and 7 and therefore they are admitted in evidence.

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[fol. 581] And ROWLAND ALFRED FABIAN, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

Q. Will you state your name, please?
A. Rowland Alfred Fabian.
Q. And where do you live?
A. 508 Lake Street, Hobart, Indiana.
Q. And I will ask you what your occupation or profession may be?
A. Civil engineer and land surveyor.
Q. Where did you go to school, Mr. Fabian?
A. Purdue University.
Q. What if any degrees do you have?
[fol. 582] A. Bachelor of Science in civil engineering.
Q. What particular projects have you worked on in the past—that is, public projects, I would say?
A. Through my corporation, Fabian-Fabian Engineers, we do civil engineering and land surveying service in the State of Indiana.
Q. And what if any public projects have you worked on during your business career?
A. Many housing projects in the Calumet area. We do an extensive amount of work for the Northern Indiana Public Service Company. I have done work for the City of Gary; done work for the Indiana Toll Road Commission.
Q. What particular work have you done with respect to the City of Gary?
A. Personally, commencing to act in the year 1950, I have done layout work, surveying work and field measurements for the City of Gary and Aviation Commission in relation to their airport. I have done work for the owners of the airport.
Q. Now with respect to the airport, do you mean the Gary Municipal Airport?
A. Gary Municipal Airport.
Q. And that is the airport which is located just to the north of the Toll Road, is that right?

A. Yes.

Q. In the City of Gary?

A. Yes.

Q. Now, Mr. Fabian, I will ask you, what is the fact as to whether you have prepared—I will put it this way: tell [fol. 583] me whether you have made any investigation or measurements—or actually made measurements with respect to the physical characteristics and aspects of the terrain as it lays to the south of the north-south runway as it is located on the Gary Municipal Airport, and as it was located at the time the Toll Road was constructed?

A. I have.

Q. Do you have those drawings with you?

A. I have.

Q. May I have them, please?

A. Yes. (Hands documents to counsel)

Mr. Thorpe: Mark this plaintiffs' exhibit number 15.

(Document (drawing) referred to, marked by reporter for the purpose of identification Plaintiffs' exhibit number 15.)

Q. Mr. Fabian, I will ask you to examine what has been identified as plaintiffs' exhibit 15 and after having examined it I will ask you if you recognize this exhibit?

A. I do.

Q. And I will ask you if you know who prepared it?

A. I did.

Q. Now what does that purport to show?

A. It is a two-scale representation of a 3,600 foot north-south runway. It shows this runway is intersected by another runway—

Q. Running in what direction?

A. Running generally northwesterly and southeasterly.

Q. Yes.

A. It shows further certain specific measurements, showing the extent of the airport property, the width of the [fol. 584] Grand Calumet River as it exists on the date here shown. It shows measurements from the Grand Calumet River to the north edge of the Toll Road pavement, and it shows another measurement which is the distance

from the north edge of the Toll Road pavement to the center line of the South Shore Railroad. It shows the approximate location of six temporary lighted poles. All of these measurements on the center line projected of this north-south runway.

Q. Now specifically locating the subject matter of this exhibit, I will ask you, what is the fact as to whether that pertains to the north-south runway on the Airport which is known as the Gary Municipal Airport?

A. It does.

Q. I note at the bottom of this exhibit, Mr. Fabian, you have some drawings on what appears to be a graph, is that right?

A. Yes, sir.

Q. Will you state what that represents on this exhibit?

A. This is a graphic representation of the elevation of the ground and existing improvements from the end of the north-south runway across the Gary Airport property to the river bank. The river bank elevation is shown; the water elevation is shown; the edge of the river is again shown which would be the south bank of the river; the elevation of the edge of the Toll Road, the pavement, is shown and noted, and the ground between the Toll Road and the South Shore Railroad is graphically represented, and the elevation of the top of the rails of the South Shore [fol. 585] Railroad are graphically represented, and the elevation of those temporary lighted poles are generally described in there graphically.

Q. When you say "generally described," explain what you mean by that.

A. We are representing a large area out there on a small piece of paper, and in engineering tolerance it is an elevation of say a thousand feet of land represented on a piece of paper 36 inches long, and as a consequence the thickness of a pencil amounts to a foot or two of elevation in a thousand feet of distance. As a consequence the graphic representation is the general elevation of it, while noted values are specific.

Mr. Thorpe: Now, your honor please, we offer in evidence what has been identified as plaintiffs' exhibit number 15.

The Court: Plaintiffs' Exhibit Number 15 may be admitted in evidence.

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[fol. 586] Mr. Thorpe: Mark this plaintiffs' exhibit number 16.

(Document (drawing) referred to marked by reporter for the purpose of identification Plaintiffs' Exhibit Number 16.)

Q. Mr. Fabian, I hand you what has been identified as plaintiffs' exhibit number 16 and ask you to examine it, and after having done so I will ask you if you recognize that exhibit?

A. I do.

Q. Do you recognize the subject matter of it?

A. I do.

Q. Who prepared it?

A. I did.

Q. Now, Mr. Fabian, I will ask you to tell us generally what this exhibit represents.

A. This exhibit is the report of the field measurements made prior to and shown on the previous exhibit. This exhibit is very similar to the other exhibit only it doesn't show anything graphically pertaining to these measurements along the center line. In addition to the previous things shown on the exhibit, this is expanded to show again in generality the location of the E. J. & E. Railroad, the Toll Road, the concrete ribbons—by that I mean the concrete strips of pavement. It shows the South Shore Railroad tracks; it shows the Toll Road right-of-way; it shows the general location of the Grand Calumet River in this immediate area. It shows specific measurements along this center line of the north-south runway. It shows only the end of the north-south runway, and it shows a general location of some obstruction poles. It shows the general elevation—or the specific elevation of the top of the South Shore [fol. 587] rails; it shows the specific location of the elevation, and the elevation of the Toll Road pavement, and it shows the specific elevation of the end of the runway. It shows specifically where the measurements were taken—in other words, on the previous drawing we speak in generalities it was so many feet. This one shows where those feet

were measured and how it was measured. It is a report of the field measurements.

Q. I see some figures here at the bottom indicating trolley wire. Now I will ask you to explain what if anything that notation on this plat means?

A. In addition to these other measurements on the center line projected off the north-south runway where it crossed the trolley wire of the South Shore Railroad, the measurement of the elevation was taken and was noted. That elevation is the specific elevation at the point of intersection of the two lines. It being the line of the trolley wire, which is electrical, where it lies on the top skid of the railroad track, it being an electrical railroad, is the intersection of the trolley wire and the center line projected of the north-south runway.

Mr. Thorpe: The plaintiffs offer this exhibit number 16 in evidence.

Mr. McMahan: May I ask one preliminary question: This probably would be equivalent to what you surveyors call field notes?

A. It is a report of my field notes. It isn't my specific field notes—

[fol. 588] Mr. McMahan: Field notes reduced to a map?

A. That is correct.

Mr. McMahan: The defendant has no objection.

By Mr. Thorpe:

Q. Who made the field notes?

A. I did and my surveying crew under by personal direction. I was on the job.

By Mr. Thorpe:

Q. You were on the job?

A. Yes, sir; specifically.

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The Court: Plaintiffs' Exhibit Number 16 may be admitted in evidence.

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[fol. 589] Direct examination.

By Mr. Thorpe:

Q. Now, Mr. Fabian, as I understand it, you testified you had done some work for the Indiana Toll Road Commission?

A. Yes, sir.

Q. Do you know when that was?

A. My work with the Indiana Toll Road Commission preceded the actual construction. We did a lot of work in the right-of-way acquiring.

Q. What year was that?

A. 1954 and 1955.

Q. Do you know when the Toll Road was finally constructed and traffic was permitted to use the road?

A. Generally speaking I think it was opened in 1956.

Q. About what time?

A. August or September.

Q. Sometime—

A. In the fall.

Q. In the summer or fall?

A. Yes.

Q. Now, Mr. Fabian, aside from your professional qualifications I will ask you what is the fact as to whether you are also an aircraft pilot?

A. I am.

Q. Now, Mr. Fabian, I will ask you if it isn't a fact you have been familiar with the construction of the Gary Municipal Airport from the start?

A. That is true.

Q. Now with reference to some time previous to the construction of the Toll Road in its present position, I will ask you if you were familiar with the original construction and layout of the north-south runway as it is now located upon [fol. 590] the airport?

A. I am.

Q. And what was the length of the original construction of it?

A. 3,100 feet.

Q. And what if anything was done to that runway with respect to any improvement for the purpose of increasing the utility of that runway?

A. It was lengthened.

Q. And how much was it lengthened, if you recall?

A. Specifically it was lengthened 200 feet on the south end 300 feet on the north end, to an existing total length of 3,600 feet.

Q. I will ask you what is the fact as to whether that was the existing length of the runway at the time the Toll Road was constructed?

A. It was.

* * * * * * *

Q. What if anything else would you know was being done with respect to increasing the utility of the north-south [fol. 591] runway at or about the time that it was lengthened and before or at the time the Toll Road was being constructed?

* * * * * * *

A. To answer this question is extremely difficult in the fact that counsel has not asked me to build up my background of the relations with the Gary Airport Commission, and I can't answer the question "Yes" or "No"—

Q. If you can't, that is a good answer to me. Now, Mr. Fabian, with respect to what may or may not have been an obstruction to the approach—or in the approach and getting out of the north-south runway, I will ask you if you know what if any obstructions may have existed previous to the construction of the Toll Road?

A. The wooden poles, the support poles for the trolley wire of the South Shore Railroad are an obstruction and [fol. 592] hung up there. Then at the approximate end of the first stage of the Gary Municipal Airport some right-of-way lights—not right-of-way lights but some obstruction lights were caused to be put upon some temporary wooden poles.

Q. With respect to that I will ask you if you know what if anything was being done to reduce those obstructions at or before the time the Toll Road was constructed?

A. I know that there were negotiations going on between the powers to be—

Q. Now specifically—you say "powers". That may mean a lot of things. Who do you mean?

A. The consulting engineers for the Toll Road Commis-

sion—I beg your pardon—Gary Airport Commission and the South Shore Railroad—

Q. And who was the consulting engineer?

A. Beine, Hall and Curran.

Q. Anybody else?

A. The contractor occasionally. There were daily meetings and at these meetings these things occurred and at which I was present.

Q. What was the object of these negotiations?

A. To lower these wooden poles and the center line of the South Shore Railroad, and with the lowering of the wooden poles and the center line of the South Shore Railroad the obstruction light poles could also be lowered a proportional amount.

Q. As an engineer I will ask you whether that was feasible or not?

A. It is feasible—was feasible.

[fol. 593] Q. As a matter of fact there was no reason why that could not be done?

A. No, sir.

Q. Now as an engineer do you know to what height then the obstruction, after the removal of these temporary obstructions—to what height any obstructions over the South Shore Railroad could have been reduced to; do you know that?

A. I do.

Q. Tell us what it would be.

A. The support poles constructed by the Toll Road Commission for the South Shore Railroad immediately west of the E. J. and E. Railroad track, these support poles on the top of all—I am referring now to specific tops of all—

Q. Yes.

A. The support poles could be and can be taken as they were west of the E. J. and E. Railroad by the Toll Road Commission of a height of 24 feet above the top of the rails.

Q. Now as I understand it, you know those were contemplated negotiations going on?

A. Yes, sir.

Q. Mr. Fabian, do you know whether that was ever done?

A. No.

Q. Do you know why it wasn't done?

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Q. You can answer that "Yes" or "No", do you know why it was not done?

A. Yes.

Q. And why was it not done?

[fol. 594] A. The construction of the Toll Road interrupted the collections of money, or whatever it took to put this plan into operation.

Q. Now when the Toll Road went through, you are familiar with the elevation of the Toll Road, are you not?

A. Yes.

Q. Now before the Toll Road went in what was the effective operating obstruction to ingress and egress to this north-south runway, any obstruction that there may have been?

A. The obstructions were the center support poles for the trolley wires of the South Shore Railroad.

Q. After the Toll Road went in, then what was the effective obstruction to the ingress and egress of this north-south runway?

A. The Toll Road and any vehicles upon the Toll Road.

Q. Then, as a matter of fact, anything that might have been done with respect to reducing of any obstructions along the railroad became useless?

A. Yes.

Q. Now, Mr. Fabian, previous to the location and construction of the Toll Road, I will ask you if you know where the river bed of the Calumet River was?

A. Yes, sir; I do.

Q. Do you know what if anything was done with respect to the construction of the Toll Road to the bed of the Calumet River? Now that is asking for a "Yes" or "No" answer, if you know.

A. Yes.

[fol. 595] Q. What was done with respect to the Calumet River?

A. It was shifted north.

Q. And who did that?

A. The Toll Road Commission.

Q. And do you know how much it was shifted north?

A. Only generally.

Q. Generally how much was it shifted north?

A. As small as 100 feet and as much as 175 feet.

Q. Mr. Fabian, now again referring to plaintiffs' exhibit number 15 which you have prepared, and indicating thereon the center line of the north-south runway as it intersects the river bed of the Grand Calumet River, and the north side of it, I note that you have an engineering designation thereon which indicates Gary Airport property. Is that correct?

A. Yes, sir.

Q. With respect to this particular exhibit I will ask you if that refers to the Calumet River as it now is or before its removal?

A. As it now exists on the date of this drawing and the subsequent exhibit 16 are measurements taken in the month of January, 1958. So at least is after the construction of the Toll Road.

Q. Now previous to the construction of the Toll Road, and if you were drawing this property line in, where would it have to be represented on this exhibit?

A. What is shown here as the north line of the Grand Calumet River and the south line of the Grand Calumet River as it exists on this drawing on this date, what is the [fols. 596-615] south line of the Grand Calumet River now was, prior to the construction of the Toll Road, the approximate—

Mr. McMahan: What is now the south line of the Grand Calumet River is—

The Court: He said the present south line.

A. (Continuing) The present south line of the Grand Calumet is what was formerly the north line of the Grand Calumet River.

Q. And with respect to the Airport property, where would the south line of the Airport property have been approximately?

A. 175 feet farther south than the two exhibits show it now.

Q. That would be approximately the width of the river?

A. Approximately the width of the river.

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[fols. 616-618] And TURNER CURRAN, plaintiffs' witness, being recalled to the Stand, testified as follows:

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[fol. 619] Voir dire examination.

By Mr. McMahan:

Q. Mr. Curran, with reference to the runways which are indicated upon plaintiffs' exhibit 3-b, can you tell us whether the runways were actually constructed as they are shown on the exhibit?

* * * * * * *

A. When you say that the alignment of the runways as shown on this exhibit 3-b is the same for the existing run-[fol. 620] ways—that is, the northwest-southeast runway and the north-south runway, the east-west runway, has never been constructed as of today.

Q. Has the northwest-southeast runway been constructed according to this exhibit?

* * * * * * *

A. They have been constructed to come up to this in the future. The existing runway is 100 feet wide, where this one shows—I believe it shows 150; I am not sure of that but I believe it does. The existing runway is constructed 100 feet wide and the existing runway now has 4,600 feet length; whereas, the master plan as of this date shows a proposed future length of 6,000 feet.

Q. With reference to the north-south runway has it been constructed in accordance with this proposed lay-out plan?

A. Again I say, that the alignment has remained as shown in accordance with this master plan. The runway at present is 3,500 feet—3,600 feet—I beg your pardon—the master plan as of this date showed 3,900 feet proposed eventually.

Q. And the width was not the same either?

A. Again, the width as shown on the master plan is 150 feet and the construction is 100.

Q. And actually isn't it a fact that the north 300 feet of the existing runway extends beyond the boundaries as indicated on this map?

A. That is right.

[fol. 621] Q. So the existing 3,600 feet of runway at this time does not lie entirely within the boundary as marked on plaintiffs' exhibit 3-b?

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A. That is right. That additional 300 feet doesn't show on exhibit 3-b.

Q. It is not part of the outline of the runway on the exhibit, is it?

A. That is right.

• • • • • • •

[fol. 622] Mr. McMahan: The defendant, Indiana Toll Road Commission, objects to the admission in evidence of plaintiffs' offered Exhibit Numbers 3, 3-a and 3-b for the reasons that same are defective, unenforceable, void and unconstitutional and for the following specific reasons, separately and severally:

The defendant is an essential governmental agency and not subject to any zoning ordinances, general or airport;

That the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of due compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;

[fols. 623-630] That the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary, Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain;

• • • • • • •

[fol. 631] The Court: I understand the matter now is on the objection to the admission of plaintiffs' exhibits 3, 3-a and 3-b.

Mr. McMahan: And 10.

The Court: And 10. This morning, and all morning long, I have been going over this decision and trying to find some law that might satisfy the court in what it is going to do.

The Indiana Legislature has enacted two acts. The legislature enacted what is known as the Airport Act of 1945 and in that act granted municipalities the right by ordinance to create aviation authority with certain delegated [fol. 632] powers, duties and rights. One of the powers that it granted to the municipality was the right to zone areas surrounding an airport and setting up that the authorities thus created would have the right of eminent domain and would have the right to exercise, having rules, regulations and so on, as to the proper conduct of the airport to provide for the safety of airplanes using facilities coming in and going out. It also gave the right to the airport authorities under the ordinance which the municipality was empowered to enact, the right of eminent domain which is a governmental function.

The legislature also, in 1951, created the Toll Road—the Indiana Toll Road Act and acts amendatory thereto—under which a Toll Road commission was created, with the right to establish a public highway, and under that act the Toll Road Commission was given the right of eminent domain and the right of police powers.

The question raised in the objection—it has been stated as an objection in substance—that the ordinance as adopted by the counsel of the City of Gary is invalid and that it is an unenforceable ordinance and is the granting of an unreasonable delegation of police powers. Also that if the ordinance is invalid it is not enforceable against the State of Indiana, and also that the zoning feature of the airport ordinance is attempting to do under police powers what the courts say should be done under the provisions of eminent domain.

We have two statutes in the State of Indiana in which [fol. 633] a grant of police powers is given to each. Under the Airport Act of 1945 municipalities are given the right to establish airports and to adopt ordinances with reference to their control, and with reference to providing rules and regulations for the safe conduct of airplanes used going to and from the airport. In this particular case they have extended—zoned the area surrounding the airport—the physical site of the airport. At the same time the State of Indiana under the statute has created an agency

of the state to establish a Toll Road and fixing its alignment.

I note in reading the Airport Act of 1945, and Section 14-417, that one of the paragraphs says, "No state, county, city or other highway, road, street or other public way, no railroad, powerline, or other right of way of any kind or nature shall be laid out or opened across any airport or upon or in such proximity thereto as to affect the safe operation thereof without the approval of said board and council, both concurring.".

Now that is the limitation in my opinion of the police power on the part of any other agency in the exercise of its police power. And it is an extension of the police power which the Airport Act of 1945 has created.

The question is whether or not there is a conflict between the Airport Act of 1945 and the Toll Road Act of 1951 so as to render the ordinance as created under the Airport Act of 1945 as and being subservient to the Toll Road Act and render it inoperative, ineffectual and in-[fols. 634-637] valid so far as to meet the conditions of this objection. I believe that you must read both statutes together so that you can reconcile them both, if possible. I don't believe they are in conflict. In my opinion as between both of them I feel there hasn't been a delegation of the City of Gary under the ordinance—under the statutes created under the Airport Act of 1945 which would render that ordinance invalid. I think it has probable exercise of police powers. What the distinctions are I don't know. I reason that together that it answers the matters of whether or not it is enforceable against the state—they are both agencies of the state. I don't feel there is any conflict between these statutes.

With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that area which immediately rests outside—without the physical boundaries of the airport as established under the statute of 1945. Therefore, I am going to permit the exhibits to be admitted. I am admitting the exhibits into evidence.

• • • • • • •

[fols. 638-639] And PAUL JANKOVICH, one of the plaintiffs and a witness on behalf of Plaintiffs, being recalled to the Witness Stand, testified as follows:

Direct examination resumed.

By Mr. Thorpe:

* * * * * * *

Q. Now, Mr. Jankovich, I hand you what has been identified as plaintiffs' exhibit 8 and ask you to look at it and examine it and tell us if you recognize that instrument?

A. I do.

Q. Will you tell us generally without stating the contents, what it is?

A. It is a modification and amendment of our original ground lease.

Q. I note this purported amendment was dated the 6th day of September, 1955, is that correct?

A. That is right.

Q. Now with reference to this particular amendment of the lease I note that it has to do with the second hangar which was constructed on the Airport, is that right?

A. That is right.

Q. And I think you heretofore testified you and your brother built that hangar and paid for it?

A. That is right.

Q. When was that hangar built and paid for?

A. The hangar was built either 1953—

Q. I mean—

A. About 1954.

* * * * * * *

[fols. 640-643] Mr. Thorpe: I think this is the last exhibit I have now, your honor please, and I offer it in evidence.

* * * * * * *

Mr. Thorpe: Permission to offer them, and I am now offering them.

* * * * * * *

[fol. 644] Q. Now, Mr. Jankovich, I think when we got off of the flying business we were discussing the effect

of turbulence over a solid obstruction such as the Toll Road, and discussing procedures in getting out—off of the Airport. Now let's assume the wind around in the northerly quadrant, that is to say, off somewhere in the north and blowing approximately down the north-south runway as it is now and as it was back in 1955 and 1956, and we will assume again a wind of approximately seventeen or eighteen miles an hour, and assuming again an aircraft approximating 30,000 pounds gross weight. I believe you identified an aircraft similar to that, did you not?

A. I did, yes.

Q. What particular aircraft do you have in mind?

A. Lockheed Ventura.

Q. Now assuming, for the purpose of landing, that you were going to attempt to land that aircraft on the north-south runway: I will ask you in the interest of safety if you would attempt to land that aircraft on the runway with the Toll Road in the position in which it is now and the elevation at which it has been constructed?

* * * * * * *

[fol. 645] Q. I will ask you, what has been your experience with the Lockheed Ventura, for instance?

A. Well, I have flown them occasionally.

Q. And have you ever had occasion to land them on the Gary Airport?

A. Yes.

Q. And have you had occasion to land one on the north-south runway?

A. Yes.

Q. And was that previous to the construction of the Toll Road?

A. Yes.

Q. Have you ever landed one afterwards—after the Toll Road was constructed—on the north-south runway?

A. No, I haven't.

Q. I again ask you the same question I previously asked you, as to whether, in the interest of safety, you believe it would be safe to attempt to land that aircraft under the circumstances which I just set out for you?

A. I don't think it would be safe.

Q. Now with respect to this particular aircraft, what is the approximate landing speed of the Ventura?

A. Our landing or touch-down speed is roughly 120 miles an hour.

Q. Now assuming that you are going to land that aircraft and there were no obstructions which would prevent your landing, will you describe the procedure which is necessary for you to prepare for a landing and execute a landing of that aircraft?

[fol. 646] A. Well, in the first place, from a safety standpoint, we have to make a straight approach for the landing two miles without any turning; straight in at a low altitude with partial power; that is, brake in its power and real shallow, and we attempt to reduce the speed and hit the end of the runway and just cruise in on the runway at about 120 miles an hour.

Q. Now of course obviously at 120 miles an hour—is that the approach speed you attempt to maintain or landing speed?

A. That is landing speed. Our approach speed is approximately 150 miles an hour on a final approach, and we slow down from 150 to 120 at touch-down.

Q. Now you have said two miles out you had to straighten out and line up with the runway. Do you know approximately how many feet that would be?

A. Two miles you mean?

Q. Yes.

A. Two miles is a little over 10,000 feet.

Q. That would be a little over 11,000—

A. No.

Q. No, 5,280—a little over 10,000 feet?

A. That is right.

Q. Now how long, or how many seconds would it take you on the average to negotiate this 10,000 feet into the runway?

A. Oh, it would be around 45 or 50 seconds; something less than a minute.

Q. Now going to the next category that we discussed the other day, I think in the 20,000 class: now you identify the aircraft of approximately that weight, do you not?

[fol. 647] A. I do.

Q. And what do you designate it as being?

A. Lockheed Lode Star.

Q. Have you flown a Lockheed Lode Star?

A. I have.

Q. And are you familiar with it?

A. I am.

Q. And have you ever landed one on that Gary Airport previous to the construction of the Toll Road?

A. I have.

Q. Now would you regard an attempt to land a Lode Star under the circumstances which I have just indicated to you on the north-south runway over the Toll Road as it was constructed and is now constructed?

A. You say, would I attempt to land it?

Q. Would you, in your opinion as a pilot, believe it is safe to attempt the landing of that aircraft?

A. No, sir.

Q. Now approximately what is the landing speed of the Lode Star?

A. It is approximately 100 miles per hour—95 to 100.

Q. Now with respect to the landing run of these heavy aircraft such as you have described, what procedure do you have to use in bringing them to a halt, and tell us approximately how much runway is necessary to bring them to a halt under the conditions we have been discussing.

A. Well, that is a rather long question. We always figure the longer the better, but the less runway you have the harder it is on the braking action on the airplane. [fol. 648] We have to cramp the brakes which is hard on the airplane and gives severe stresses, and we assume a 3,600 runway is just about the minimum we would like to use.

Q. Now getting down into the 15,000 pound gross, I think you described an aircraft, or identified an aircraft which would fall in that category, is that right?

A. Yes, I did.

Q. And what did you describe?

A. I think I mentioned a Lockheed 10 and Beach Craft. I think they are both about the same size.

Q. Now with respect to these heavy aircraft we have been talking about, from 15,000 up to 30,000, possibly over, is there any material difference in the landing charac-

teristics of these heavier aircraft; that is, between the whole category—the individual aircraft in the category?

A. They are pretty much the same. Aircraft about 15,000, their landing and take-off characteristics are the same.

Q. Now again assuming this 15,000 pound aircraft and the particular Lockheed, for instance, that you have described, let me ask you this, if in your opinion that is a fairly representative aircraft of that classification?

A. Yes, it is.

Q. And would that be true of the other two classifications, that is, the 20,000 and 30,000—you have identified one aircraft. Now with respect to all of the others are they what might be determined as representative of all aircrafts in those weight categories?

A. Yes, I would say so.

[fol. 649] Q. Now are you familiar with the Lockheed 10 you have described?

A. I am fairly familiar. That is an older airplane and isn't being used very much more. I just take it as a weight-type aircraft.

Q. Let's assume one being used now, a current type of aircraft in the 15,000 pounds gross weight category: can you think of one that is being currently used possibly more so than the Lockheed 10?

A. You mean below 15,000?

Q. No, 15,000 or just in that area.

A. Roughly there isn't exactly around that. You have to go down to probably 10,000. There is an area between 10 and 15 there is hardly any aircraft I could pick out that is in that weight category.

Q. By that you mean they run from 15 on up?

A. That is correct.

Q. All right. There are some of these 10's. Let's talk about that.

A. That is, the 15; they aren't 15. They are in the 10 or 12 thousand. There isn't anything right at 15,000.

Q. In your experience as a pilot and assuming the conditions we have heretofore described, I will ask you, what would be your opinion as a pilot whether it would be safe to land a Lockheed 10, for instance, under the conditions we have assumed?

A. Yes, I think it is safe.

Q. Now going back to these heavier categories: now you have this other runway on the airport, is that right?

A. That is right.

[fol. 650] Q. And it was constructed and was in operation at the time the Toll Road was constructed?

A. Yes.

Q. Approximately how long is that runway?

A. It is approximately 4,600 feet.

Q. Now assuming again this Lockheed Ventura and a 17 to 18 mile wind blowing out of the north, the same conditions I described before: now I will ask you, Mr. Jankovich, from the standpoint of a pilot and the standpoint of safety—you say you couldn't get in on the north-south runway—I will ask you if—having in mind safety factors—it would be safe to attempt to land in that aircraft on the northwest-southeast runway?

A. No, sir.

Q. And explain to the court why it would not be.

A. Well, aircraft that are landing into the wind, they don't have any appreciable danger so far as getting out of track and drifting or anything because they are headed into the wind and tend to stay weathervane into the wind. When they are coming in a severe cross-wind—we call "severe" anything over fifteen miles an hour—aircraft wants to drift at the rate of fifteen miles an hour to the side opposite the way the wind is blowing, and the pilot has to veer the airplane into the wind and drop a wing; in other words, what we call "crabbing" into the wind and keep your directions straight. Instead of doing so the aircraft comes in sideways, or slightly sideways, and the pilot must be very skilled to catch that landing wind before [fol. 651] it hits the ground and straighten it up in a cross-wind landing. Otherwise, when the airplane hits it lands in a drifting position or drifting attitude and it creates a severe side load on the airplane landing gear, and such side loads are liable to collapse the landing gear and cause considerable damage to the aircraft.

Q. So that now, if you were unable to get onto the north-south runway, then, as I understand what you have said, the pilot has no alternative, he has to go away?

A. That is right.

Q. Would what you have said with respect to the Ventura also apply to the Lode Star in the 20,000 pound class?

A. It would.

Q. Now with respect to under the 15,000 pound class, what is the fact as to whether you have the same difficulty in crosswind landing with those aircraft?

A. Yes, the crosswind difficulty is essentially the same.

Q. Could you, however, make a crosswind landing with the lighter aircraft with less danger than you could with the heavier aircraft?

A. Yes, that is possible, due to the fact the light aircraft is much more maneuverable than heavy aircraft. Heavy aircraft is much slower to respond to the controls, where light aircraft is quicker.

* * * * * * *

[fol. 652] Q. Now, Mr. Jankovich, you have heretofore testified as to the improvements which you and your brother put on the field. Now with respect to equipment and investments in parts that you had on the field, particularly at the time the Toll Road was built, I will ask you to describe what other equipment and facilities you and your brother had furnished for the field at that time.

A. Well, as far as parts, and so forth, we have a complete inventory of scientific engine parts which we supply to the industry in general. We have quite large stocks of aircraft parts, miscellaneous parts such as propellers, tires [fol. 653] and sparkplugs and wheels and landing gear; other parts in general that make up a complete inventory. We also had airplanes.

Q. How many at the time the Toll Road went in?

A. Our aircraft vary from year to year. I would say we probably had four or five.

Q. Describe them. What kind were they?

A. Well they are Beacheraft, Bonanzas, Cessnas and I think we had one Swift and possibly one or two Aeronca aircraft.

Q. And what have you today?

A. At the present time we have two Beacheraft and one Swift and one Cessna. "Now do you have other equipment on the airport?"

Q. Yes.

A. We have a tractor or two usually—

Q. What kind of a tractor?

A. Ford tractor, and we do have a small caterpillar we are not using now but at that time I think it was there. And we always had one or two mowers for mowing the field. We have a couple of gas trucks.

Q. What capacity are those trucks?

A. One is 2,000 gallon and one is 400 gallon. We have a bulk plant—I don't know whether you call that equipment. That is a bulk plant on the field.

Q. What does that consist of?

A. Consists of three 12,000 gallon tanks. Then we also have numerous miscellaneous equipment such as aircraft engine heaters, ground heaters used in the winter time. And we have welding equipment and other general main-
[fol. 654] tenance equipment that is used on an airport.

Q. Do you have a maintenance shop?

A. We do.

Q. With respect to that describe it briefly. What does the shop consist of?

A. We have an aircraft maintenance and overall shop which consists of large aircraft jacks and all jacks, and all types of hand tools and rolling benches, and permanent fixed benches. And we have a complete set of mechanics' tools. We have engine oil storage space. And there may be other items I can't just think of.

Q. In addition to this tell me whether you have machine tools in the machine shop?

A. Yes, sir; we have some machine tools.

Q. What would they consist of?

A. They will consist of lathe and drill press and some sheet metal equipment such as a sheet metal brake and small hand sheetmetal tools.

Q. Now, Mr. Jankovich, with respect to the business you operate there, will you tell us what particular part of this business has been affected by the Toll Road and its intrusion into the glide path?

* * * * * * *

[fol. 655] A. Actually the only part that has been affected by the Toll Road is the operation and maintenance and the

servicing of aircraft grossing over 15,000 pounds gross weight.

* * * * * * *

Q. Now when you say it has been affected, how did it affect your business?

A. It has been affected due to the fact these aircraft cannot safely use the north-south runway all the time.

Q. When they cannot use the north-south runway what is the result then of you getting this business?

A. The result is they go some place else rather than risk crosswind landing on this airport. They will probably go to Chicago, South Bend or some other airport that has adequate facilities.

Q. I call your attention to the fact that there has been testimony here now to the effect that the runway was [fol. 656] lengthened before the Toll Road went in and there were negotiations going on for the lowering of temporary obstructions to the south along the South Shore Railroad. Now assuming those obstructions had been lowered and you had the runway extended as it was at the time the Toll Road was built, I will ask you, what is the fact as to whether, under those circumstances, these aircraft in the categories which we have discussed in the previous question could have landed and taken off?

* * * * * * *

[fol. 657] A. Yes.

Q. They could have?

A. They could.

* * * * * * *

[fol. 658] Q. Mr. Jankovich, having in mind the type of obstruction which is presented by the construction of the Toll Road, as it was constructed and as it is now, I will ask you as a pilot what clearance it is necessary to use in getting over the top of the Toll Road in order to bring an aircraft in safely on the runway?

Mr. McMahan: To which the defendant objects unless the question is limited to this witness's opinion.

Mr. Thorpe: Well, it is, his opinion.

The Court: O.K. You may answer.

A. That is a variable answer, depending on the amount of wind and the amount of turbulence. I would say within a minimum of 50 feet of the traffic over the Toll Road and a maximum of 100.

* * * * * * *

[fols. 659-660] Cross examination.

By Mr. Houran:

* * * * * * *

[fol. 661] Q. When was it, Mr. Jankovich, that the Toll Road actually came into possession of this land, do you remember?

A. That the Toll Road came into possession—

Q. The Toll Road took possession of this land?

A. What land are you talking about, the property that the Toll Road sits on?

Q. Yes.

A. I don't know when they took possession but I think the Toll Road was completed in 1956 and they were a year to build through that area.

Q. Then it would be sometime during the summer or early fall of 1955?

A. About that, I think.

* * * * * * *

[fol. 662] Q. Now prior to the Toll Road there were two extensions placed on the north-south runway, isn't that correct?

A. That is right.

Q. And I think you testified there were 300 feet placed on the north end of the runway?

A. Yes, sir.

Q. And 200 feet on the south end?

A. That is right.

Q. Do you know who paid for those extensions?

A. Either the City paid for them alone or the City and the federal government matched funds.

* * * * * * *

Q. Prior to the Toll Road how many times have you flown an airplane grossing more than 15,000 pounds in the

period of time between its construction and the time you leased this property, if you recall?

A. Numerous times, I would say.

Q. Do you have any idea how many "numerous" would be?

A. No. We are flying all the time but it is hard to say. I would say a number of times.

Q. Would "a number" be between five and a hundred?

A. Well, between that.

Q. I believe you testified, Mr. Jankovich, that from the [fols. 663-670] time you leased this Airport place until the time the Toll-Road was constructed that that north-south runway was safe for all classifications of aircraft?

A. I believe I testified it was safe but marginal at times.

* * * * * * *

[fol. 671] And LEIGH FISHER, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

Q. What is your business or profession?

A. I am an airport consultant.

Q. Will you please state generally what your qualifications may be and your experience?

A. I have been the owner and operator of a business called Leigh Fisher and Associates, airport consultants since March 1, 1946. In connection with this work we have served as economic, planning, financial, management and operation consultants and advisors to over one hundred cities and governments throughout the world.

Q. Will you speak up just a little more?

A. Excuse me. In this capacity I and my associates have served as economic, planning, financial, operation and management advisors in connection with over one hundred airports for municipalities and governments throughout the world. Some of them would include, for example, Indianapolis, Evansville, South Bend, Fort Wayne, Milwaukee, New Orleans, Minneapolis, St. Paul, Los Angeles, Stock-

[fol. 672] holm, Sweden; Anchorage, Alaska; San Juan, Puerto Rico; Auckland and Wellington, New Zealand and many many others.

Q. Now with respect to the City of Gary I will ask you if you did any work for the City of Gary?

A. We worked for the City of Gary in 1948 and again in 1956.

Q. Just describe briefly from the beginning and to the end of the first operation which you worked with the City of Gary.

A. In connection with our first assignment to the City of Gary in 1947 and 1948 we prepared a market study—aviation, of the market study of the Calumet area, being Whiting, East Chicago, Hammond, Gary and its surrounding metropolitan area for the basic building area and traffic planning of the proposed Gary Municipal Airport. At that time we worked with the Board of Aviation Commissioners and engineers, Beine, Hall and Curran in viewing a master plan which they had prepared and in making some slight modifications to it with respect to general aviation and executive aircraft use.

Q. Now you speak of a master plan—you refer to a master plan, and I will hand you what has been identified as plaintiffs' exhibit number 10 and ask you to examine it.

A. Yes, sir.

Q. What is the rest of it? Look it over.

A. Yes. (Witness looks as plaintiffs' exhibit No. 10.)

Q. Now having examined plaintiffs' exhibit 10, I will ask you if this is the master plan to which you have referred [fol. 673] and with respect to the work which you say you did for the City of Gary?

A. This is the Master Plan which resulted from our work with the Aviation Commissioners and Beine, Hall and Curran.

Q. Now will you describe what work you did for the City of Gary and for whom in 1956?

A. In 1956 we worked for the City of Gary Board of Aviation Commissioners again in connection with the revision of the Master Plan—proposed revision to the Master Plan necessitated by changes in the area including—part of it was the construction of the Toll Road.

Q. You are familiar then—actually from the physical aspects—pardon me—the physical characteristics of the airport and the Master Plan as represented by exhibit 10? I say, you are then familiar with the glide slope to runway 2-20 of the Gary Municipal Airport, is that correct?

A. In 1949 in the original work that we did we were not as concerned with the glide slopes then as we were with the building area layout because engineers, Beine, Hall and Curran and the Civil Aeronautics Administration as distinct from this new agency, the Federal Aviation Agency created last year, had established that the runway lengths were adequate and we did concur with them that the glide slopes could be properly protected. By 1956, as a result of the construction of the Toll Road, we worked with the Board [fols. 674-675] of Aviation Commissioners in reviewing the development of the north-south runway, and at that time did investigate from information on file with the Board of Aviation Commissioners furnished through Beine, Hall and Curran and the Toll Road authority to the Board, as I recollect, the glide slope problems as a result of the construction of the Toll Road.

* * * * * * *

[fol. 676] Q. Mr. Fisher, have you in mind the information you have now examined from plaintiffs' exhibits number 15 and 16—I will hand it back to you—and with respect to those exhibits I will ask you if the same physical characteristics of the airport exist today as they did in 1956?

* * * * * * *

A. To the best of my knowledge they do prevail.

Q. All right. Now with that information before you, Mr. Fisher, I will ask you if you can tell the court what appeared to be the permanent limiting obstruction to runway 2-20 as it existed in 1956?

[fol. 677] A. As it existed in 1956?

Q. After the construction of the Toll Road.

A. According to the information you have presented me here in the form of these exhibits, the permanent limiting obstruction is the Toll Road, and fifteen foot clear height over the nearest moving traffic lane of the Toll Road as

prescribed by the C A A and F A A and the Bureau of Public Roads.

Mr. Purvis: To which the defendant moves the latter part of the answer be stricken. We are not charged with violation of any F A A or C A A regulations; that is not in issue in this complaint or in this case. We are charged with the violation of an ordinance, of less glide to the top of an obstruction we are accused of erecting. F A A and C A A regulations have nothing to do with the issue here, and the answer should be stricken as pertains to those regulations.

The Court: That part of the answer may go out. Now do you want to make an objection? I think the rule is for the purpose of making an objection—move to strike the answer for the purpose of making an objection. I will allow it to go out, that part that refers to any reference to the F A A and C A A; I believe they have it, and Bureau of Federal Roads—may go out.

Mr. Purvis: For the purpose of protecting the record may we have a motion to strike the answer because the witness answered before we had a chance to object. The answer having been stricken we object to that portion [fols. 678-679] just going in.

The Court: The objection is sustained.

Q. Now, Mr. Fisher, with respect to the information you have before you with these two exhibits, you say that the permanent limiting obstruction to the runway—to runway 2-20, I take it that is what is generally known as the north-south runway of the airport?

A. Yes, sir; runway 2-20 is the compass heading 20 degrees and 200 degrees; after-shortened to 2-20, common reference to runway orientation.

ing in mind the data which is before you in exhibits 15 and 16 now before this court, I will ask you if you can tell the court what the glide slope would be over the Toll Road to the existing runways as they are now and as they were in 1956?

[fol. 681] A. Yes.

Q. Mr. Fisher, how do you determine the glide slope with respect to the physical features as depicted on plaintiffs' exhibits 15 and 16, and with respect to the north-south runway?

A. A glide angle is determined in its ratio between the full lineal distance forward with respect to horizontal distance attended, and as commonly expressed, for example, as a 40 to 1, meaning 40 feet forward for one foot in vertical elevation. It is determined by a simple mathematical calculation from surveys and fixed engineering data conventionally furnished by surveyors duly licensed [fol. 682] and registered who furnish it to operational people for calculation and use.

Q. Now, Mr. Fisher, I will ask you if you have made such a calculation with respect to the elevation of the Toll Road as it now exists and as illustrated by plaintiffs' exhibits 15 and 16?

A. We have made it to a point fifteen feet over the Toll Road.

Q. Now then with respect to a point fifteen feet over the Toll Road and as disclosed by the information contained in plaintiffs' exhibits 15 and 16, I will ask you now what you find to be the glide slope over the Toll Road to the end of the runway as it now exists and existed in 1956 on the north-south runway?

Q. [illegible]

A. I am.

Q. Now again I will ask you if you are familiar with the flight characteristics of aircraft in the category of 15,000 pounds gross and over?

A. Yes, sir.

Q. Now with respect to the glide path which you have just described, and with reference to this particular category, I will ask you if the glide path you have just described would be adequate for that type of aircraft?

* * * * * * * *

[fol. 685] A. If your honor permits I have to answer this in narrative form. The operation of aircraft at any glide slope is a function of the useable runway length which rises in front of the touchdown point of the aircraft after it [fol. 686] reaches the point of impact on the runway. Therefore, a given glide slope must be measured in terms of foreground and useable runway length of the runway you are approaching to. I believe it was 27 to 1 glide slope, is marginal—it is entirely adequate for all of the lighter aircraft and marginally adequate to the existing runway for most heavier engine executive aircraft under normal, operating and crosswind conditions.

Q. Now, Mr. Fisher, you are familiar with the present length of the runways and their location with respect to the Toll Road, is that right?

A. I am.

Q. And you relate that information to the information which is exhibited in plaintiffs' exhibits 15 and 16, is that correct?

A. I have.

Q. You say you have used a figure of fifteen feet over the Toll Road in order to estimate glide angle, is that right?

A. Yes.

Q. Why did you use that figure?

* * * * * * * *

[fol. 687] A. Since January, 1949 it has been mandatory in the industry to clear any public road by fifteen feet over the edge of the nearest moving traffic lane on a public highway for an airport to be eligible for federal aid and participation in construction costs by the federal government.

has been prescribed originally by the Bureau of Public Roads and the C A A because the trucks which pass on the public roads form an obstruction thereon which must be cleared by aircraft.

* * * * * * *

[fol. 688] Q. Now, Mr. Fisher, prior to the construction of the Toll Road, and having in mind again the information, the elevations which appear on plaintiffs' exhibits 15 and 16, what was the permanent limiting obstruction to runway 2-20 to the south as it was constructed in 1956, previous to the—strike the question—it is getting too involved; I will try to simplify it.

Prior to the construction of the Toll Road what if anything might be—or could you describe as being a permanent limiting obstruction to ingress and egress to run-[fol. 689] way 2-20, or the north-south runway, as it was constructed at the time the Toll Road was constructed and previous to it—I must limit it to that. Do you understand the question?

A. I do. Prior to the construction of the Toll Road the permanent limiting obstruction to runway 2-20 was the limiting catenary height of the South Shore Railway lines.

Q. What was the extent of this South Shore obstruction?

A. To the existing runway end?

Q. Yes.

A. Prior to the construction of the Toll Road?

Q. Yes.

A. To the existing runway end, prior to the construction of the Toll Road, that catenary support height would have restricted the glide slope to approximately 38 to 1.

Q. So that from your answer to the previous question are you able to determine what effect the Toll Road had on this glide slope?

A. As I testified earlier it reduced it to 27 to 1 under the same conditions and became a permanent limiting obstruction.

Q. Now will you tell the court what practical effect would result from this change in the glide slope?

A. I testified earlier that the change in glide slope in itself is not as critical as the remaining runway length.

Q. All right. Tell us what the result would be.

A. The result would be—there are two results from it; first, the reduction of the glide slope from 38 to 1 to 27 to 1 to a measured runway length of 3,600 feet means that all [fol. 690] of your lighter type of aircraft could easily or safely accommodate—use that glide slope, but your heavier twin engine executive aircraft became marginal at that runway length and that reduced glide slope, and it depends on the pilotage, techniques and the nature of the glide slope—what underlies the glide slope.

Q. Now you talk about pilotage. And what do you mean by that?

A. When flying aircraft down a glide slope into a runway end you have the aircraft reduced in speed and in power and therefore more vulnerable to sudden changes in attitude and position. To a longer runway you have an unselected area in which to recover by the application of power thereby reduces the speed and using the longer length places the aircraft on the ground, stopping its flying speed and holding it on the runway. The placing of an obstruction placed in a glide slope, although it may meet glide slope minimums, becomes quite critical if there are turbulences or psychological hazards. In the case of any physical obstruction such as the Toll Road or any major earthworks at the landing end of a runway—crosswind runway down which the wind blows at higher speeds—because the crosswind runway is used only during high wind conditions—if the runway limitation and turbulent condition exists it causes the air to rise up and therefore the pilot will tend to raise himself up over the minimum, which wouldn't normally be done if it was just a chimney [fol. 691] or something of that type. The same conditions prevail when the obstructions are vulnerable in height as on a highway, such as automobiles and trucks. So that the practical effect is that the pilot raises the glide slope at his own discretion to avoid these unpredictable occasions. In addition to the loss of the measured length of the runway of some—I believe it was 440 feet; I would have to check my notes—when the Toll Road was constructed the City of Gary had just previously constructed 300 feet on the north end of the runway and 200 feet on the south. This was

just prior to the Toll Road's construction. When the Toll Road was constructed the change from the catenary support height on the South Shore Railroad, which would be 24 feet over the railroad track to 15 feet over the nearest lane of the Toll Road, in effect wiped out that 300 feet on the north end and in effect took 140 feet more of useable runway. May I continue in this narrative?

The Court: Yes.

A. Because as an obstruction is moved in the runway end, either an aircraft must sustain this glide slope in the runway end or must maintain the same glide slope and land farther down the runway and lose its useable length, thereby reducing its useable length.

Q. Now you say, reducing the useable length. Do you recall what the length of the north-south runway was at the time the Toll Road was constructed?

A. Approximately 3,600 feet.

Q. Now the moving in of this permanent obstruction as [fol. 692] represented by the Toll Road, I will ask you what effect it had with respect to the useable runway that then existed in the flight of aircraft in this heavier category?

A. The useable length is a function of glide slope. As testified, if any aircraft could maintain the 27 to 1 glide slope over the Toll Road as a limiting obstruction, it could use the full 3,600 feet of runway which then existed on the ground. At a 40 to 1 glide slope over the Toll Road as the limiting obstruction, a useable length of 3,080 feet would remain.

Q. Would that be adequate for aircraft in categories of 15,000 and over?

A. Not for the majority of them.

Q. With additions to the runway—that is, extending in length—would that change the picture with respect to the ingress and egress of aircraft over 15,000 pounds—that is, the available runway—available space if it was extended—if it was possible to extend it on the airport to alleviate that situation?

A. If the landing to the north—that is the approach to the south over the South Shore and Toll Road in the southerly end of runway 2-20, no southerly extension would

benefit aircraft of the heavier category, only its northerly extension, since it is at the point where aircraft touch down that fixes useable runway length, and the limiting factor is useable glide slope into the southerly end which, as I have testified earlier, for the heavier aircraft is only marginally adequate at this time. It is not possible to ex- [fols. 693-694] tend the runway farther on the north under present circumstances.

Q. Now, Mr. Fisher, I will ask you if you are familiar with what the Master Plan anticipated as an ultimate length of this runway?

• • • • • • •

[fol. 695] A. The Master Plan as prepared in 1940—the one I testified to earlier—1948—

Q. 1948.

A. 1948, and with which we worked in our original work with the City of Gary, anticipated an overall runway length of 3,900 feet for runway 2-20. Before the construction of the Toll Road the City of Gary did cause 200 feet—first, to start off: they built approximately 3,100 feet of it in the first stage. Just before the construction of the Toll Road the City of Gary did cause 200 feet more to be added to the southerly end of it, leading toward the Master Plan length to bring the Master Plan length all under construction to 3,300 feet. But at that time in an effort to alleviate the construction problems at the south end they added 300 feet more to the north end. Then in addition the Master Plan as adopted in 1948 would permit an additional 600 feet to be constructed from the present south end [fol. 696] of the runway to the Master Plan south end making thereby a measured length of 4,200 feet overall, end to end, including the Master Plan, plus 300 feet to the north —or 3,900 feet Master Plan plus 300 feet to the north. Is that a complete answer?

• • • • • • •

Q. Now, Mr. Fisher, you have testified concerning the elevation of the South Shore catenary, and assuming the South Shore catenary support as a permanent limiting obstruction prior to the construction of the Toll Road, what would the glide path be—or what glide slope could be

made to the proposed Master Plan's extended length; that is, specifically the southerly threshold?

A. Approximately 21 to 1.

Q. Now with the Toll Road construction what glide slope would then be permitted to the Master Plan's southerly extension to which you just testified?

* * * * * * *

[fol. 697] A. The South Shore support heights as I testified earlier, made it 21 to 1 to the Master Plan end, and with the Toll Road construction it reduced it to 11 to 1 from the Toll Road as the limiting obstruction to the runway end as defined in the Gary Zoning Ordinance.

Q. What did this change in the ultimate glide slope mean?

* * * * * * *

A. The change in the glide slope from 21 to 1 to 11 to 1 meant that the 11 to 1 is totally unacceptable for all types of aircraft except helicopters, and 21 to 1 is acceptable for only lighter aircraft.

Q. With respect to what length of the runway?

A. That is, the glide slope?

[fol. 698] Q. Yes.

A. My answer at that time was with respect to a glide slope with respect to an indefinite runway length.

* * * * * * *

Q. Now from an operational viewpoint and with respect to the glide slope you have just testified to, and further with the runway extended to 4,200 feet as you just testified to, what would that mean operationally?

A. Operationally I said that no aircraft except a helicopter, a rotary, one with some direct landing could operate on 11 to 1, and only lighter aircraft could operate at 21 to 1. But it means effectively when the glide slope would be changed by the pilot sometimes as he approached this specific runway and would touch down at a point down the runway, depending—the point of impact would depend on the glide slope that he elected to maintain over the obstruction.

Q. Now assuming that he maintained a glide slope of 40 [fol. 699] to 1, what would happen to the useable length of the runway of 4,200 feet?

A. Referring specifically to the Master Plan southerly end of the runway and a measured length there may be north of 4,200 feet, at the 40 to 1 glide slope over the Toll Road the only useable length from the aircraft touchdown point of 3,080 would remain, and over the South Shore catenary support as a limiting obstruction, 3,520 feet.

Q. Which of those last measurements would be acceptable to aircraft in the categories of 15,000 and over?

A. The 3,520 feet with normal obstructions—in other words, no turbulence—no undue turbulence—you always get turbulence in approaching—but without undue turbulence the 3,520 feet would be adequate for all but the major airline jet transport equipment.

Q. So now maintaining the same glide angle over the Toll Road as it now exists and did exist, say to a 4,200 foot runway, what would be the remaining useable runway left?

A. As I have testified earlier, 3,080 feet. It is the same whether you extend the runway or not. The touchdown point would be on the existing runway as it exists today at that glide slope.

Q. Now using a glide slope of 20 to 1 which you have previously testified to over the catenary on the South Shore, what effective runway would you have as it now exists?

A. As it now exists?

Q. Yes.

[fol. 700] A. 20 to 1 over the catenary support height on the South Shore to the existing runway, 38 to 1.

* * * * * * *

The Witness: I wish to correct that answer. I erred and gave an answer in slope rather than distance.

A. 5,600 feet, the full measured length.

Q. And assuming a glide slope of 20 to 1 on the Master Plan, what would be the useable runway?

A. 4,200 feet, the actual planned length.

[fol. 701] Q. That would be the total length?

A. At a 20 to 1.

Q. Now to get this straightened out I will ask you the same question with respect to over the Toll Road?

* * * * * * *

Q. Assuming the 4,200 foot runway and using a 20 to 1 glide angle over the Toll Road what would be the useable length of the runway?

A. 3,860 feet approximately.

* * * * * * *

[fol. 702] Cross examination.

By Mr. McMahan:

* * * * * * *

Q. Do you know what the length of the north-south runway of the Gary Municipal Airport was on March 23, 1950?

* * * * * * *

Q. Do you know when the 300 feet extension to this runway was constructed?

A. Not the specific date of construction. I recall that it [fol. 703] was after our last engagement with the Board—after our finishing engagement in 1951 I believe I recall since we served the Board, my memory tells me three years after the airport was placed under construction initially and prior to our 1956 work. As I recall it was 1954 or 1955.

Q. That is the same time the 200 feet was constructed to the south?

A. Yes, sir; it was prior to the construction of the Toll Road.

Q. I believe you testified you needed to construct this 30 feet to the north in order to clear the obstruction to the south before the Toll Road was built, is that correct?

A. Yes, sir; I did.

Q. What were those obstructions to the south at that time that required that 300 feet to be built?

A. They would be the South Shore catenary supports.

Q. Weren't some South Shore construction lights also erected?

A. Well, my understanding is these obstruction lights go on control by the City of Gary, placed there by the City of Gary and not by the South Shore.

Q. Do you know when they were placed there?

A. I don't of my own information. I recall they were placed there before the time the airport was placed in operation.

Q. Do you remember or do you know when the 3,100 feet of runway was built?

A. I don't know—I don't have the information with me.

Q. But it was early in 1948 or 1949 or 1950, in that area?

A. Just prior to 1950.

Q. Just prior to 1950?

A. As I recall.

[fol. 704] Q. You think the obstruction lights of the South Shore were constructed about the same time?

A. About the same time.

Q. And they have been in existence ever since?

A. To the best of my knowledge.

* * * * * * *

Q. Do you know what the elevation of those obstruction lights on top of the poles are with reference to the elevation of the runway?

A. We have them in the record, and I probably could find them. We weren't too concerned because at the time of that, before the 1956 engagement, we proceeded in extended conferences on the necessary refurbishing of the South Shore Railway. They were to lower the catenary to the minimum height at the time to clear up that south approach which was not done officially because of lack of money.

[fol. 705] Q. That didn't take place in 1956?

A. No, sir; because in 1956 it was too late to raise them. The Toll Road had been constructed and if anything the obstruction lights would have had to have been raised.

* * * * * * *

[fol. 706] Q. You have testified that planes over 15,000 pounds gross would use the north-south runway from the south with marginal safety, is that correct?

A. Yes, sir.

Q. Do all planes landing and taking off use the north-south runway?

A. No, sir.

Q. Have you conducted any surveys to determine the percentage of flights coming into the field from the north and taking off to the north as against planes coming in from the south and taking off to the south?

A. We have, and Mr. Jones has information of that type that he has compiled.

[fol. 707] Q. But you have no—

A. I have knowledge of the results rather than having calculated it myself.

Q. A plane takes off one way or the other because of the prevailing wind conditions?

A. They do, sir.

Q. Planes will take off to the south when the wind is from the south, is that right?

A. Yes, sir; over— May I qualify that with a narrative response?

Q. Answer the question if you can.

A. The wind is a limiting factor only when it exceeds a given velocity. Winds having a maximum of three or four miles are not critical. Winds over that, even up to seven miles per hour are not critical for almost any aircraft with a pilot of reasonable competence. Therefore, no taking off or landing is normally done on the shorter runways on an airport. Normally the pilot elects to take off on the longest runway under any wind circumstances which would permit it. Therefore, in response to your inquiry, if under wind conditions requiring it, when the velocity exceeds— at this point discretion comes in because lighter aircraft with tail wheel must take off into the wind and land, of course, into the wind at most landing velocities of ten miles an hour and over. but for aircraft change in configuration when nose wheels are installed and when the aircraft gets heavier, their wind violence increases—crosswind violence [fols. 708-715] increases up to a point normally considered in the industry up to fifteen miles per hour crosswind component. For any heavier type airline aircraft we ride on regularly in scheduled service, normally they switch over to the crosswind runway.

Q. The point you touched on in direct examination I want to clarify. In other words, a plane grossing over 15,000 pounds would normally use the northwest-southeast runway

because of its greater length as long as wind conditions necessitated such a takeoff into the wind?

A. Yes, sir.

Q. And you testify the break in the wind as to which runway they would use would be about fifteen miles an hour?

A. Depending on the wind—crosswind and landing gear configuration of the aircraft and, of course, considering the pilot's ability.

Q. At this time then you would not say that the Gary Airport was rendered completely useless for landing or takeoff for planes grossing over 15,000 pounds?

A. It has not been rendered totally useless for aircraft of that weight.

* * * * * * *

[fol. 716] Redirect examination.

By Mr. Thorpe:

Q. Now, Mr. Fisher, you have testified as to the effect of the Toll Road with the runway as it is now and the runway as it would be if extended. Now I will ask you this question: what if anything do you know of that could be done which would alleviate or cure this marginal use of the north-south runway which is created by the Toll Road?

* * * * * * *

[fol. 717] A. The question as I will take it was asked is what could be done to this airport with respect to improving the situation which has now come to pass as a result of the Toll Road construction?

Q. Yes.

A. That is the question to which I will address myself. There is nothing that can be done that is economically feasible in my judgment.

Q. Now you said in answer to Mr. McMahan's question in effect that it didn't destroy the usefulness of the airport. This catenary, say, on the north-south runway how does it affect the operation of the airport?

A. I believe my testimony was to the effect that this reduction of glide slope and useable length of the north-south runway didn't render totally useless the Gary Municipal

Airport for aircraft weighing 15,000 pounds or more. I said that because the wind conditions requiring the use of the north-south runway, according to our findings in our November, 1956 report to the Board of Gary Aviation Commissioners, are approximately eleven percent of the time we have cross-wind component in excess of fifteen miles an hour on the northwest-southeast runway. Therefore, theoretically the airport would be available for use unrestricted eighty-nine percent of the time by these same aircraft. In practical effect what this means is, there is a reduction in the desirability of the use of an airport because when a person takes off from St. Louis or New York or Minneapolis or Denver coming to the Chicago area air- [fol. 718] ports he doesn't know that the wind conditions when he arrives here will be over fifteen miles an hour crosswind or not. He may have some idea from the Weather Bureau reports, but there is no way by which he can know over a two or three or four hour span flying period what the practical change in the weather will be. As a result he will elect, if he has knowledge of the critical conditions with respect to the crosswind runway, if there is any question of the pilot in his own ability to safely land his aircraft, he will select another location for his point of touchdown. Now that is speaking with reference to the transient pilot, the person who passes through and brings commerce and industry and patronage to your fixed base operator. There is also the effect, however, that the man who lives—or the company aircraft—who resides in the Chicago area, or the southern part of it, and owns heavy twin aircraft that executives use—that is, heavy, being in excess of 15,000 pounds, will, given possibility, locate their aircraft and make their investment and place their site of basing their aircraft on another airport if the conditions are better. For example, we work in this area for Rockford, Illinois, as well as other areas, and we have found specifically that—I believe it was International Harvester elected that after investigation to base their aircraft at Rockford instead of Gary because of runway conditions. Now, therefore, the only thing I can testify on of my own knowledge and experience is the fact that depending on the circumstances [fol. 719] the reduction in usefulness cannot be less than

eleven percent but can vary under the circumstances as high as a total loss of certain types of business where there are acceptable alternatives, and in this case Rockford and DuPage County and some of the others.

• • • • • • • •

[fols. 720-721] Q. Mr. Fisher, with respect to this heavy aircraft, and based upon your previous testimony, I will ask you if you know what can be expected in the industry with respect to an eleven percent limitation of the use of aircraft over 15,000 pounds?

• • • • • • • •

A. In an eleven percent absolute limitation means, as I testified earlier, that if there is any alternative, the owners and operators of the affected aircraft will select another location for basing and operating to obtain dependability of usage. If I may explain here this dependability of ... age—

• • • • • • • •

[fol. 722] Q. Well, Mr. Fisher, I will try it this way: assuming an aircraft owner who has an aircraft in the 30,000 pound gross category, an executive owner, and he is confronted with an airport, a two-runway airport, which has a crosswind runway such as the north-south runway on the Gary Airport, I will ask you from an economic standpoint what effect it would have upon that owner if he attempted to base his aircraft on the Gary Airport under those conditions?

• • • • • • • •

A. Insurance provisions impose upon operators of aircraft in excess of 15,000 pounds, as well as other aircraft, used in the civil air transport field for non-airline operation—which is commonly referred to as general aviation or [fol. 723] executive aviation—frequently and commonly impose on the heavier aircraft equipment regulations with respect to the type of operations that they shall be permitted, the type of airports they may operate into and out of, the type of pilots and their experience and ratings and standings that shall be permitted to fly them, because of the excessive liability which has come to be recognized in

aviation insurance, and underwriters have, as a result of serious accidents, informed corporate executives this not only does not prevail in all of the executive aircraft—the insurance regulations do not prevail in all of the cases of executive aircraft, they usually prevail in the case of heavier twin engine aircraft of the newer or faster type, and by newer and faster I include the World War Two reconstructed aircraft which have been made useful for executive aviation transportation. As a result they will now standardize conditions in insurance policies and which will grant the carrying of certain specified important officials of the various companies, which as a result as a normal circumstance, it is recognized that where airport limitations do exist and no satisfactory alternative airport sites are available upon which to base the aircraft, the company will base its aircraft on a restricted airport or sub-standard airport with their pilots and will subsequently fly off empty —no gas, no pay-load—picking up their load at an unrestricted airport. Therefore, there is an economic factor which is beyond the safety factor when the case of alterna-
[fol. 724] tive locations to base such an aircraft are available.

* * * * * * *

[fol. 725] And JAMES B. JONES, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

Q. And I will ask you, what is your profession?

A. I am Vice-President of Leigh Fisher and Associates, airport consultants.

Q. What is your profession?

A. I am an airport consultant specializing in aviation economics.

* * * * * * *

[fol. 726] Q. Now, Mr. Jones, I will ask you if you are familiar with the Gary Municipal Airport?

A. Yes, sir.

Q. And are you familiar with its location in the community?

A. Yes, sir.

Q. And with respect to its location I will ask you if you are familiar with the economic aspects pertaining to this airport to the aviation industry?

A. Yes, sir.

Q. What is the fact as to whether you have made an analysis of the economic circumstances surrounding the Gary Municipal Airport?

• • • • • • • •

A. Yes, sir.

[fol. 727] Q. When did you make that analysis?

A. In 1956 in connection with our 1956 study.

Q. Have you made any investigation concerning that matter since?

A. Only very cursory, briefly, to bring it up—certain data to bring it up to date at the present time.

• • • • • • • •

[fol. 728] Q. Well, I will ask you from your investigation of the circumstances of the economic conditions surrounding the Gary Municipal Airport if you know what types of aircraft would use that airport, assuming that the north-south runway had no limitations on it as of the year 1956 at the time when the Toll Road was constructed?

A. The Gary Municipal Airport is a general aviation airport; that is, it is designed primarily to meet demands of non-airline civil aviation. These civil aircraft can generally be divided—classified into four categories. Class 1 might be defined as general aviation aircraft having a total rated horsepower from all engines of having more than 750 horsepower and having more than one engine on these aircraft. The class 2 aircraft, the second category, could be defined as those aircraft having more than one engine to develop less than 750 horsepower per engine. The class 3 category might be defined as single engine aircraft three place or over; and class 4 as single aircraft as class 1 and 2 place. So in general the size of the aircraft would vary inversely to the class as I have set them up.

Q. Now with respect to weight, what classification would [fols. 729-907] you say the 15,000 pound planes would fall into?

A. Those aircraft would all fall into one class category; that is, multi-engine aircraft developing more than 750 horsepower per engine.

Q. Assuming we have a runway such as has been described here as the north-south runway where due to obstructions on the airport such as have been described as being the Toll Road which would result in a marginal use—I believe that is the term—a marginal use of the airport as a result of this runway being so afflicted, what particular class of operation of the aircraft would be affected?

A. The only class of aircraft adversely affected by the obstructed approach to 2-20 is class 1 type of aircraft.

* * * * * * *

[fol. 908] STANLEY M. SHARTLE, called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Winfield L. Houran:

* * * * * * *

[fol. 909] Q. What is your business, or occupation?

A. Professional engineer.

Q. And I will ask you whether or not you hold any registration in the State of Indiana.

A. I am registered professional engineer, land surveyor.

Q. How many years experience do you have as a registered engineer, Mr. Shartle?

A. Ten years as a registered engineer.

Q. And how many years experience as a registered land surveyor?

A. Fifteen.

Q. What is a registered land surveyor?

A. A registered land surveyor is a person who is authorized by the Indiana Board of Registration for Professional Engineers and Land Surveyors to practice land survey in Indiana.

Q. What is a registered civil engineer?

A. Is a person who is authorized to practice professional engineering within the State of Indiana by the Indiana Board of Registration for Professional Engineers and Land Surveyors.

Q. Have you ever held governmental offices?

A. Yes, I served one, two year term, as Surveyor of Hendricks County; also two years of another term in the same office.

• • • • • • •

[fol. 910] Q. By whom are you now employed Mr. Shartle?

A. The Indiana Toll Road Commission.

Q. How long have you been employed by them?

A. Six years.

Q. Since 1954?

A. Yes.

• • • • • • •

[fol. 911] Q. Now, back in the years 1954, 1955, 1956, I will ask you whether or not you were familiar with the area of the Gary Municipal Airport located in Lake County?

A. Yes, I was.

Q. How were you familiar with it Mr. Shartle?

A. I made occasional field inspections of the progress of the work in order to see if additional right of way was required along the route.

Mr. Thorpe: What was that, the last?

A. I made field inspections of the right of way during construction.

Q. And you were also familiar with the north-south run-[fol. 912] way as it existed immediately prior to the construction of the Toll Road, is that right?

A. Yes.

• • • • • • •

Q. I will ask you if you have ever conducted a survey of the Gary Municipal Airport, specifically in respect to the north-south runway?

A. Yes, I have.

Q. When was that done, or, give us the dates you were out there.

A. It was commenced on April 23rd, 1958 and was finished last month.

Q. Now, did this survey also include survey of obstructions located at the north and south end of this runway?

A. Yes, it did.

Q. What was the purpose of this survey, Mr. Shartle?

* * * * * * *

[fol. 913] A. The survey was made at the request of the General Counsel of the Indiana Toll Road Commission.

Q. And what did you subsequently do with the notes and figures you took out there when you made these surveys?

A. They were abstracted in the form of plan and profile.

* * * * * * *

Q. All right, now explain to the court, Mr. Shartle, just what was done and how this survey was conducted, if you will.

A. On the first day we measured the distance from the south end of the north-south runway at the Gary Airport to the obstruction lights which are located on the south side of the Chicago, South Shore and South Bend Railroad, and also measured the width of the existing runway.

Q. What was done the next time?

A. On the next day we measured the height of certain obstruction lights south of the south shore railroad.

Q. How was that done?

A. That was done by a combination of spirit leveling and triangulation.

[fol. 914] Q. What is spirit leveling?

A. Is a system by which the difference in elevations of two points may be determined.

Q. By a spirit level?

A. Or surveyor's level.

Q. What was done after that?

A. The elevation of the south end of the north-south runway was determined.

Q. How was that determined?

A. That was done by leveling from a bench mark located on the Toll Road.

Q. What was done after that, Mr. Shartle.

A. On March 7th and 8th, 1960.

Mr. Thorpe: 1960?

A. 1960, yes, I measured the length of the north-south runway and ascertained elevations of the runway at the center portion and at the north end; also measured the elevation of the end location of the Industrial Highway, and also determined the position and elevation of certain points on the Tanktainer Welded Products building.

Q. Where is this building located generally in respect to the north-south runway of the Gary Municipal Airport?

A. It is on the center line of the north-south runway projected northward.

Q. All right, when did you next go to the Gary Municipal Airport?

A. On April 26th.

[fol. 915] Q. Who was with you on that day? What year?

A. In 1960, with me was Ward D. Hobson, a registered engineer.

Q. Have you gone there since that date?

A. Not to make a survey. We have passed by the site.

Q. Now, what then was done with the figures, and notes, you made as a result of these surveys in 1958 and subsequently?

A. Those were put down in final form of plan and profile; also plan and elevation.

Q. And they were put down on what?

A. They were put down on linen tracing cloth.

Q. Mr. Shartle, I will hand you what has been marked, for purpose of identification, Defendant's Exhibit "A", and ask you if that is a true and exact copy of these figures that you obtained as a result of these surveys?

A. Yes, it is a true and exact copy of our measurements as we obtained them at the site.

Q. Now, you stated that you were familiar with the north-south runway of the Gary Municipal Airport prior to the Toll Road, is that correct?

A. Yes.

Q. And, can you say, Mr. Shartle, with reasonable certainty, the physical aspects, north, and south, of the Gary Municipal Airport, were essentially the same when you made the survey as they were prior to the construction, during the construction of the Toll Road?

A. Yes, to the best of my knowledge they are the same.

Q. Now, this is, I think you testified, a scale drawing, is that correct?

[fols. 916-917] A. Yes.

Q. What do you mean when you say it is a scaled drawing?

A. That means it is drawn in approximate proportion to the actual construction and characteristics on the ground.

Q. Does the drawing have two different scales?

A. Yes, the scale of the plan represents one inch on that plan, represents one hundred feet on the ground.

Q. Now, you say this is a Plan and Profile drawing?

A. Yes.

Q. I see what appears to be two separate drawings on this exhibit, Defendant's Exhibit "A", which is the plan drawing?

A. The top drawing is the plan, which is a view as one might get from the air, high altitude.

Q. What is the bottom drawing on Defendant's Exhibit "A"?

A. That is the Profile which one might see if the north-south runway were cut with a knife, lengthwise, then viewed from the side.

Mr. Houran: Your Honor, the defendant will now offer into evidence Defendant's Exhibit "A".

* * * * * * *

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "A" is admitted in evidence.

* * * * * * *

[fol. 918] Q. Now, Mr. Shartle, will you step down here please. You testified, I think, that the top of that drawing is a view looking down on the north-south runway, is that correct?

A. Yes.

Q. That's what you call the Plan Drawing?

A. Yes, that's right.

Q. What is the scale of that drawing?

A. One inch equals one hundred feet.

Q. Does that plan then show the scale length of the runway?

A. No, no, the scale is shown on the lower drawing.

Q. I notice a dotted line running down what appears to be the center of the north-south runway on the exhibit, I will ask you what that indicates?

A. That is the center line between the edges of the runway.

Q. In other words, on this drawing, Exhibit "A" there is a broken, or dotted line, that is an imaginary line, is that correct?

A. That's right.

Q. Now I see the figures 0 plus 00 plus appear to be at the north end of the north-south runway, what do they mean?

A. That means that that is the beginning point of our measurements from the north end of the runway northward; zero plus zero is standard engineering designation meaning you start at no feet.

Q. I also notice the same figures at the south?

A. South end of the runway is the point from which we began our measurements to the structure to the south of [fol. 919] the runway.

Q. Now, Mr. Shartle, once again directing your attention to the north end of the runway, I see several lines running in a generally northwest direction labeled Industrial Highway, Route 2, is that correct?

A. I believe that is Route 12.

Q. What do those lines represent?

A. Those lines represent the north edge and south edge of the existing pavement of the State Highway.

Q. Does this drawing indicate how wide that highway is?

A. No, it doesn't.

Q. Now, I notice on this drawing here, the center line projected crosses another broken line at the figure 6 plus 81, what does that figure mean?

A. That means from the north end of the north-south runway it is 600 feet, tape lengths, plus 81 feet, or a total of 681 feet from the north end of the runway to the center line of the Industrial Highway.

Q. Then going a little farther north I notice on this same broken line, which you have testified is the center line projected, the figure 8 plus 43, what does that mean?

A. That means it is the distance from the end of the runway.

Q. North end?

A. Yes, north end of the runway to a point opposite a certain power pole is 843 feet north of the north end of the runway.

Q. And in which direction does this power pole lie from the projected north-south center line of the runway?

A. West.

[fol. 920] Q. Does the drawing indicate how many feet?

A. The pole is 318 feet west of the center line of the runway projected.

Q. Now, continuing a little farther north, Mr. Shartle, I notice the figure 9 plus 75 on the projected center line of the north-south runway, what does that mean?

A. That means that it is 975 feet from the north end of the north-south runway to a point opposite a smokestack mounted on top of the Tanktainer Building.

Q. Does that rectangle indicate anything in particular?

A. That rectangle represents the outline of the Tanktainer Company building.

Q. Do you recall what this building is constructed of?

A. I believe it is made of block, and has a brick front office, I believe.

Q. Now, at the south end of your Plan Drawing you have projected the center line, is that right?

A. Yes.

Q. What does that cross, according to your drawing?

A. The center line projected crosses a military road.

Q. Now, you say a Military Road, is that the same type road located south of the south end of the north-south runway?

A. Yes, it is.

Q. What type road is it?

A. That is a road constructed of bituminous materials. I believe it is used for access to some kind of government installation.

Q. Is it what is called a two lane road?

[fol. 921] A. Yes, it is.

Q. When you say bituminous material, you mean some type of hard-top surface?

A. Yes. Some people call black-top.

Q. Continuing on south along the center line projected of the north-south runway plan, what is the next obstruction the center line crosses?

A. The Indiana Toll Road.

Q. And following the Toll Road, Mr. Shartle, what then does the center line projected cross?

A. The Chicago South Shore and South Bend Railroad.

Q. All right, now, I believe you testified before that the lower drawing is Profile, is that correct?

A. Yes.

Q. How did you say that was taken?

A. That is what one might see if a knife were drawn along the center line of the North-South runway so that if the runway was split open in order to open it up so that you look in the side of it.

Q. Does this Profile, Mr. Shartle, show the Tanktainer Building?

A. Yes.

Q. Does it show it at the same relevant location as the Plan Drawing shows it?

A. Yes, it does.

Q. Does this Profile Drawing also show the end of the north end of the North-South runway?

A. Yes.

[fol. 922] Q. Now, I notice that you have drawn several dotted lines and I will ask you to explain those dotted lines to the court, at the north end of the North-South runway on the Profile portion of Defendant's Exhibit "A"?

A. Those dotted lines represent glide slopes drawn from the top of one of the smokestacks fastened to the top of the Tanktainer Company building.

Q. Where does the lower dotted line end?

A. At the north end of the North-South runway.

Q. You knew the height of the smokestack, is that correct?

A. Yes.

Q. You also knew the distance the smokestack was north of the north end of the North-South runway, is that correct?

A. Right.

Q. With those two figures was it possible to compute the glide slope?

A. Yes.

Q. How was that done, the glide slope?

A. It was computed by dividing the horizontal distance between those two points by the difference of their elevations.

Q. What then was the glide slope between those two points?

A. 28.4 to 1.

Q. All right, Mr. Shartle, I notice directly above that another broken line starts at the same point as the one previously mentioned, and I will ask you what that represents.

[fol. 923] A. That represents a glide slope drawn from the top of the same smokestack drawn on a forty to one glide slope to where it intersects the surface of the north-south runway.

Q. How did you compute that angle?

A. That angle was computed in the same manner as the previous glide slope.

Q. Now, does your drawing indicate the length of the runway running south of where that forty to one dotted line intersects the north-south runway?

A. Yes, it shows that distance.

Q. What is that distance?

A. 3,224.5 feet.

Q. Mr. Shartle, what does your drawing indicate the total length of the north-south runway is?

A. 3,605.5 feet.

Q. I will ask you, Mr. Shartle, whether or not the Profile Drawing on Defendant's Exhibit "A" indicates at the south end of the runway any type of obstruction light?

A. Yes, it does.

Q. Does your drawing, referring once again to the south end of the Profile, indicate the distance south of the south

end of the north-south runway that these lights are located?

A. Yes, it does. It gives the distance of two of the four lights included in our survey.

Q. Which two lights are they?

A. The two obstruction lights nearest to and west of the center line of the north-south runway projected.

[fol. 924] Q. One light is east of the north-south runway, projected, is that correct?

A. No, both of these are west.

Q. Now, how many feet south, of the south end of the north-south runway, is the farthest obstruction light?

A. One thousand four hundred forty feet (1,440).

Q. Now, that is indicated on your drawing as being 14 plus 40, is that right?

A. That's right.

Q. Now, I notice what appears to be another obstruction light on this Profile, and ask you how far that light is from the south end of the north-south runway?

A. It is one thousand four hundred thirteen (1,413) feet.

Q. Now, Mr. Shartle, I notice on your drawing there are several dotted lines, would you explain the top one to the court please?

A. The top dotted line represents the glide slope of 40:1 drawn from the first obstruction light west of the north-south runway center line, projected.

Q. Now, in which general direction is this line drawn?

A. Drawn from the south to the north, intersecting the surface of the north-south runway.

Q. Now, Mr. Shartle, does your drawing show the number of feet of runway left north of this line of intersection?

A. Yes, it does.

Q. How many feet remain?

A. Two thousand four hundred fifty-eight and five tenths (2,458.5) feet.

[fol. 925] Q. Mr. Shartle, referring once again to the Profile Drawing of Defendant's Exhibit "A", I will ask you what the next dotted line refers to, and where does it start?

A. It starts at the top of the first obstruction light situated west of the runway center line, projected, and is drawn to the south end of the north-south runway.

Q. Once again, knowing the height of the obstruction light the distance south of the end of the north-south runway were you able to compute the glide slope between these two points?

A. Yes, I was.

Q. How was that done?

A. That was done by dividing the distance from the south end of the north-south runway to the obstruction light by the difference of the elevations of the two points.

Q. And what was the glide slope, as you found it to be?

A. 21.7 to 1.

Q. Now, Mr. Shartle, immediately under this dotted line I see another dotted line, would you explain that line to the court, please?

A. That is the glide slope drawn from the uppermost point of the first catenary support pole west of the runway, the center line, projected, drawn to the south end of the north-south runway.

Q. And were you able to compute that glide slope?

A. Yes.

Q. Was that done in the same manner as you have heretofore described?

A. Yes, it was.

[fol. 926] Q. What is the glide slope?

A. 24.4 to 1.

Q. Now, immediately under that dotted line, or broken line on Defendant's Exhibit "A", referring to the Profile part of the drawing, I notice another broken line, what does that line indicate, Mr. Shartle?

A. That is a glide slope drawn from the uppermost wires on the first catenary support pole west of the runway center line projected, and drawn to the south end of the north-south runway.

Q. And were you able to compute the glide slope for that dotted or broken line?

A. Yes.

Q. What was that?

A. 33.2 to 1.

Q. All right, now, Mr. Shartle, directing your attention to the southernmost point of this Profile Drawing, I see what appears to be an electrical transmission line; describe to the court what that is.

A. That is a power transmission pole owned by Northern Indiana Public Service Company.

Q. Do you know how many wires are on that pole?

A. I count twenty-three.

Q. Now, immediately north of that pole appears an obstruction light, is that correct?

A. Yes.

Q. Immediately north of the obstruction light is what appears, you have described as being a catenary system, is that correct?

[fol. 927] A. Yes.

Q. What is a catenary system, what does it do?

A. Catenary system supports the current carrying wires that powers the vehicles on the Chicago South Shore and South Bend Railroad.

Q. Are there two systems there?

A. Yes, one for each track.

Q. Is this double track?

A. Yes.

Q. Your drawing also shows a cross section of this track, is that correct?

A. Yes, it does.

Q. Now, going a little farther north, Mr. Shartle, I see, I guess you call it, design, labeled "pole", what does that represent?

A. That represents the field or embankment upon which the end of the east-west Toll Road is constructed.

Q. Does your drawing show the number of feet south of the south end of the North-south runway that Toll Road is located?

A. Yes, it does.

Q. What part of the Toll Road is measured in obtaining that figure?

A. The north edge of the westbound pavement.

Q. How many feet is this north edge south of the south end of the north-south runway?

A. One thousand and forty-three (1,043) feet.

Q. Mr. Shartle, I will ask you whether or not your Profile [fol. 928] of the Toll Road shows the height at this point?

A. Yes, it does.

Q. What is that elevation?

A. Six hundred thirteen and one tenth (613.1) feet.

Q. Does your Profile shows the height of the south end of the north-south runway?

A. Yes.

Q. What is the height?

A. Five hundred eighty-eight and five tenths (588.5) feet.

Q. I now notice a dotted, or broken line, running from the north edge of the Toll Road to the south end of the north-south runway, and I will ask you to explain that line.

A. That is a glide slope drawn from the north edge of the westbound pavement of the Indiana east-west Toll Road to the south end of the north-south runway.

Q. Now, knowing those two items, and the distance between them, was it possible to calculate the glide slope between the two points?

A. Yes.

Q. Did you do that?

A. Yes.

Q. What did you find to be the glide slope?

A. 42.4 to 1.

Q. When did you testify, Mr. Shartle, you made your last survey at Gary Municipal Airport?

A. April 26th, 1960.

Q. What was the purpose of making that survey?

[fol. 929] A. That was made at the request of the General Counsel of the Indiana Toll Road Commission.

Q. What did that survey consist of?

A. That consisted of establishing the size, position and elevation of some of the catenary poles and transmission poles.

Q. And when did you say this was done?

A. April 26th, 1960.

Q. Who was with you when you made that survey?

A. Howard B. Wodock.

Q. How was it made?

A. It was made by a tape and stadia survey in which certain distances and angles were observed, and then the application of the principle of geometry and trigonometry entered into it.

Q. Did you reduce the figures to any type drawing?

A. Yes, I did.

Q. What type drawing was this you made?

A. I drew a Plan and an Elevation on the same sheet.

Q. All right, I now hand you what has been marked for purposes of identification, Defendant's Exhibit "B", and ask you if this is the drawing to which you have referred?

A. Yes, this is the drawing.

Q. Now, in that drawing, what is the scale, Mr. Shartle?

A. The uppermost part, which is the Plan, is one inch equals one hundred feet. The scale of the Elevation is, one inch equals twenty feet.

[fol. 930] Mr. Houran: Now, if the court please, the defendant will offer in evidence what has been marked for purposes of identification, Defendant's Exhibit "B".

. . . . . .

[fols. 931-932] The Court: There being no objection, Defendant's Exhibit "B" is admitted in evidence.

. . . . . .

[fol. 933] Q. Now, Mr. Shartle, would you step up by the drawing once again. Would you describe to the court, Mr. Shartle, what the drawing is? at the top of Defendant's Exhibit "B".

A. That is a Plan of the area from the south end of the north-south runway southward to the transmission line belonging to Northern Indiana Public Service Company.

Q. And it is similar to the Plan you have described that is shown on Defendant's Exhibit "A", is that correct?

A. Yes, it is.

Q. Now, would you describe to the court what the lower drawing is on Defendant's Exhibit "B".

A. It might be referred to "An Elevation", it is the view one might get by standing on the north-south runway and looking south along the center line of the runway.

Q. Now, I will ask you whether this elevation contains the Toll Road?

A. No, it does not.

Q. Would this, then, be a true and correct representation, looking south, of these lines prior to the construction of the Toll Road?

A. Yes, it would be.

Q. Now, Mr. Shartle, I will ask you whether or not your drawing shows, in scale, and in elevation, the end of the north-south runway of the Gary Municipal Airport?

A. Yes, it does.

Q. Would you point that out to the court, please?

A. This dash line here.

[fol. 934] Q. And there are two figures on that line, is that correct?

A. Yes.

Q. What are those figures?

A. Each figure is fifty.

Q. Representing what?

A. Representing the width on each side of the center line of the runway to the edges of the runway.

Q. That is, once again, the north-south runway?

A. Yes, it is.

Q. Making a total of one hundred feet in width, is that correct?

A. Yes.

Q. Now, I will ask if your drawing shows one or more of the catenary support poles used by the South Shore Railroad to operate their catenary system?

A. Yes, it does.

Q. Are those poles labeled as such, or is there anything distinguishing about them?

A. In order to distinguish the catenary poles from the other data shown I have lettered each with the letter "S" as shown.

Q. Do you have a legend some place that refers to the letter?

A. Yes, the legend is in the lower lefthand corner of the sheet.

Q. What does that show "S" as representing?

A. "S" represents the Chicago South Shore and South Bend Railroad pole.

Q. Do you also show on this elevation drawing, Defendant's Exhibit "B", the Northern Indiana Public Service [fol. 935] Company's electrical transmission line?

A. Yes, we show three poles.

Q. How is that designated?

A. Those poles are designated by the letter "N".

Q. What does that letter represent, according to your legend?

A. "N" represents poles owned by Northern Indiana Public Service Company.

Q. Now, I will ask you, Mr. Shartle, whether or not your elevation drawing on Defendant's Exhibit "B" shows any obstruction lights?

A. Yes, it does.

Q. How are they designated?

A. Obstruction lights are designated by the abbreviation for the word "obstruction", obs.

Q. They appear as such on your legend, is that correct?

A. Yes, and each pole is so designated on the drawing.

Q. Now, each of these various poles contain an elevation figure, is that right?

A. Yes.

Q. I also notice what appears to be lines drawn on this elevation, is that correct?

A. Yes.

Q. And they appear to be horizontal lines?

A. Very nearly horizontal.

Q. What do they represent?

A. Approximate locations of wires suspended by the poles.

Q. On what systems?

A. On Northern Indiana Public Service Company power transmission line; on the line of obstruction light poles, and on the line of catenary support poles owned by Chicago [fol. 936] South Shore and South Bend Railroad.

Q. Now, those lines are not actually to scale, are they?

A. No, the width of the line is not.

Q. But the length is, in relation to pole support?

A. That's right.

Q. What is the number of all types of lines, Mr. Shartle, at the point where the center line of the north-south runway, projected, intersects these two described systems?

A. Including the third pole line?

Q. Yes, everything.

A. At the point where the center line of the north-south runway is projected southward, there are thirty-six wires, not all of which are shown on this drawing, because in lines, in the same horizontal plane, the back wires would be hidden.

Q. I notice you point to other wires, what does that include?

A. That includes power transmission wires, communication wires, trolley wires, cables.

Q. Are there cables there?

A. Yes.

Q. How many, do you know?

A. I should say more than half of the wire there on those poles would be considered cable.

Q. What do you consider cable?

A. I don't have an exact definition, but I would say any wire with a diameter greater than perhaps one-quarter inch I might consider to be cable.

[fols. 937-939] Q. What is this line at the very bottom of Defendant's Exhibit "B", that you list as "Datum 550 feet"?

A. That is a horizontal line 550 feet above sea level, which is placed on the map in order to give some basis for measuring up to the various points on the elevation drawing for scale purposes.

(Mr. Shartle returns to witness chair.)

Q. Mr. Shartle, you have testified as to several glide slopes, or glide angles, contained on Defendant's Exhibits A and B, I will ask you whether or not you have reduced these angles, heights, or slopes, in chart form?

A. Yes, I have.

Q. I hand you what has been marked, for purposes of identification, Defendant's Exhibit "C", and ask you if this

is the chart you prepared from these angles, heights, elevations?

A. Yes, it is.

Q. What does that exhibit show?

A. This exhibit shows the glide slopes from various structures both south and north of the north-south runway in Gary to the ends of the north-south runway.

Q. That is the original instrument?

A. Yes, this is the original drawing.

Mr. Houran: The defendant now offers into evidence what has been identified as Defendant's Exhibit "C".

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "C" may be admitted in evidence.

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[fol. 940] Q. This is a chart, isn't it?

A. Yes, I refer to that as a chart.

Q. For all these angles you made the calculations yourself, isn't that correct?

A. Yes, they were.

Q. I will ask you whether or not Defendant's Exhibit "C" shows any glide slopes or angles that are not contained on Defendant's Exhibit "A"?

A. Yes, it does.

* * * * * * *

Mr. Houran: You may cross examine.

Cross examination.

By Straley Thorpe:

Q. You are not a pilot, are you?

A. No.

Q. You don't know very much about aviation?

A. No.

Q. As a matter of fact I believe you stated you don't know anything in particular about aviation, outside of you have seen airplanes?

A. I have ridden in them is about as far as my knowledge goes.

[fol. 941] Q. I will ask you if you didn't have this question asked you: Question. How did you say that was taken? To that question you made the following answer: Answer: That is what one might see if a knife were drawn along the center line of the north-south runway so that if the runway was split open in order to open it up so that you look in the side of it. You made that answer, did you not?

A. The answer isn't exactly right.

Q. I didn't ask you that, you made that answer?

A. Yes.

Q. Now, as a matter of fact, Mr. Witness, the representation on the bottom of this Exhibit "A" is ten times exaggerated isn't it?

A. Yes, it is.

Q. So that the only measurement that you have on this exhibit, on the bottom, which would correspond to the top of the exhibit, the top representation, would be the horizontal measurement, isn't that true?

A. No, the dimensions contained on the lower.

Q. Your figures are correct but the representation is ten times exaggerated? Now, in regard to your exhibit number "B", now you have testified, I think, as follows: Question. Now, would you describe to the court what the lower drawing is on Defendant's Exhibit B? Answer: It might be referred to "An elevation", it is the view one might get by standing on the north-south runway and looking south along the center line of the runway.

[fol. 942] You made that answer did you not?

A. Yes.

Q. As a matter of fact this drawing is five times exaggerated on the bottom?

A. No.

Q. Look at the scale.

A. One inch to twenty.

Q. Now, with regard to the measurements on top—the lower part of this exhibit is five times exaggerated, is it not?

A. No, I should say not.

Q. You mean to tell me now this is what you would see if you were standing on the end of the runway looking south?

A. Yes.

Q. What is the scale to the lower part of your illustration?

A. One inch equals twenty feet.

Q. You did the same thing with Exhibit 1, except that is ten to one.

A. Exhibit A is the only one showed an exaggerated scale, sir.

Q. Now, let's get this straight, the top representation in Exhibit "B" is the scale of one to one hundred feet, isn't it?

A. Yes, it is.

Q. Now, then, with respect to the location of these poles down here on the lower part of this illustration which you have drawn, I will ask you again if this isn't exaggerated five times?

A. No.

[fols. 943-949] Q. With respect to the top scale?

A. The lower drawing is a different scale, but no exaggeration.

Q. You don't pretend if one were standing on the end of the runway you should have seen a view of these pole lines at one to one hundred feet, one to twenty feet?

A. No, it was never intended to imply that.

Q. Now, you don't intend to imply that, do you, when I am talking to you, you don't intend to imply that, do you?

A. What?

Q. Just what you said you didn't intend to imply that, do you say you do not now intend to imply when I am talking to you?

A. The scale of the Plan View at the top is five times smaller than the one at the bottom in order to get it on the sheet; there is no exaggeration involved in either drawing.

Q. But with respect to each other there is five times, the lower scale is five times larger than the top one?

A. Yes, it is.

Q. What you are trying to say now is each has to stand by itself, each of these illustrations on Exhibit "B"?

A. Yes, that's right.

* * * * * * *

[fol. 950] SAMUEL P. MOISE called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Purvis:

Q. State your name to the court, please?
A. Samuel P. Moise.
Q. What is your business, your profession, or occupation?
A. Attorney at Law.
Q. Do you practice law in the State of Indiana?
A. I have for forty years, more, or less, past.
Q. What schools, if any, did you attend in preparation for your profession?
A. Got an LLB from Northwestern University.
Q. Are you a member of the bar of any other state, Mr. Moise?
A. Illinois.
Q. Mr. Moise, what, if any, position have you held with the city of Gary, Indiana?
A. President of the Airport Commission for eight years.
Q. During what years were you president of the Board of Aviation Commissioners?
A. I believe from fifty-two to sixty.
Q. That would be January 1st, 1960?
A. That's true.
Q. Mr. Moise, are you familiar with the location of the Gary Municipal Airport?
A. Yes, sir.

* * * * * * *

[fol. 951] Q. If you can, would you describe the boundary of the Gary Municipal Airport?
A. At the east, the approach is to the east, I think the east boundary line is Clark Road; the west is, I think, the E.J. & E. Tracks; to the south is the Calumet ditch to the north is U.S. Highway 12.
Q. If you can, Mr. Moise, if you have personal knowledge, would you describe the area surrounding the airport?

A. It is highly industrial.

Q. Are you familiar with the north approach to the north-south runway of the airport?

A. Yes, sir.

Q. That would be the approach over which the Industrial Highway crosses?

A. U.S. Route 12.

Q. Are any buildings located on the north approach to the area?

[fol. 952] A. Yes, there is the Tanktainer establishment, and there are others, of course, along the highway there.

Q. Would you describe the type of industries within an area of half a mile from the Gary Airport?

Mr. Thorpe: What direction?

Q. In all directions from the Airport?

A. Well, I would say the Mills are approximately, they are to the north; to the west you have your railroad, and you have, I think, Cities Service and I think other gas producing plants; to the south you have the Gary railway and, partially, residences to the east. There are some business places there to the east.

Q. When you refer to "Mills", Mr. Moise, what particular Mills do you refer to?

A. U. S. Steel Corporation.

Q. When you refer to the refinery, what particular refinery do you refer to?

A. Cities Service, I am not so sure within half a mile radius I don't recall that.

Mr. Thorpe: The question is directed to your specific question you are answering.

Q. If you are not sure within a half mile radius, Mr. Moise, could you be as accurate as possible in describing it as a somewhat greater or lesser distance?

A. It could be within a mile. You also have the Northern Indiana Public Service Company to the north.

Q. Now, directing your attention, Mr. Moise, to the south approach to the north-south runway, I will ask you whether [fols. 953-967] or not you know whether there are any structures or obstructions?

A. Yes, sir.

Q. What are those obstructions?

A. Well, you have the Toll Road; you have the Gary City Railway; you have the electric wires, and telephone wires, and you have the telephone poles, and also eight poles erected by Northern Indiana Public Service Company.

Q. Now, I will ask you if you know whether or not there are any obstruction lights on the south approach?

A. Yes, sir. On top of eight poles.

Q. Have you seen the relative height of those poles compared with the height of the Toll Road at that point?

A. I have seen it, yes.

Q. Then I will ask you whether or not the obstruction lights are higher than the Toll Road at that point?

A. They are.

* * * * * * *

[fol. 963] Q. Now, Mr. Moise, are you able to say, from your own personal knowledge, whether or not the obstruction lights located on the south approach to the north-south runway are permanent, or temporary?

* * * * * * *

A. Yes, sir. I answered I said, yes, sir.

Q. Are they permanent, or temporary?

* * * * * * *

[fols. 969-978] A. My opinion is it is intended to be permanent construction.

* * * * * * *

[fol. 979] Q. If you know, Mr. Moise, will you state who requested the erection of the obstruction lights on the south approach to the north-south runway?

* * * * * * *

A. Yes, I know.

Q. Who requested the erection of the obstruction lights on the south approach to the north-south runway?

A. Nick Jankovich suggested it.

Q. Now, those are obstruction lights which are located south of the Toll Road, also south of the South Shore Railroad track, is that correct?

A. Yes, south of the north-south runway.

Q. Now, if you know, Mr. Moise, for the period during which you served as President of the Aviation Board, will you state whether or not there were ever any negotiations with the Chicago South Shore and South Bend Railroad [fol. 980] with respect to lowering the wires, their catenary system, and poles, where that railroad crosses the south approach of the north-south runway?

A. Yes.

Q. Were there ever any negotiations with the South Shore Railroad with respect to lowering those, lowering the catenary system, the poles and wires as they are located south of the south approach?

A. Not during the eight year term of my office.

Q. Were there ever any negotiations, if you know, with the South Shore Railroad with respect to lowering the obstruction lights located south of the South Shore Railroad on the south approach of the north-south runway?

A. No negotiations with the South Shore.

Q. If you know, will you state whether or not during the period you were President of the Aviation Board, were there ever any negotiations with Northern Indiana Public Service Company for lowering any of their poles as they are located on the south approach to the north-south runway?

A. Negotiations to lower, no, sir.

. . . . . .

[fols. 981-986] Q. Mr. Moise, do your knowledge did either Nick or Paul Jankovich, doing business as Calumet Aviation Company, ever request that obstruction lights that are located south of the South Shore Railroad on the south approach to the north-south runway, did either of the Jankovich brothers ever request that those obstruction lights be lowered?

A. No, sir.

. . . . . .

Cross examination.

By Straley Thorpe:

. . . . . .

[fols. 987-988] Q. Now, Mr. Moise, you made the statement to direct examination of counsel, that in your opinion these lights were permanent lights, is that right?

A. Yes, they were placed there to remain permanently.

Q. Just wood poles set up there, aren't they?

A. Yes.

* * * * * * *

[fol. 989] Q. We will suppose now that that runway was extended to the south, toward the obstruction lights, as provided by the master plan, would you regard those obstruction lights then as having been so permanent they couldn't have been cut down, lowered?

[fols. 990-994] A. Poles can be cut at any time, if they so decided. I don't get it, don't understand the question.

Mr. Thorpe: I don't think you do. That is all right.

Q. So, when you said those lights were up as permanent fixtures you didn't mean they were up for all times, sometime they might change, you think they could change the height of the poles?

A. That could happen any time.

Q. So that when you said they were permanent lights you didn't intend for the court to believe they never would be changed?

A. In my opinion, I said, since we paid about eleven thousand to put them in, at the time I made inquiry I was told those poles could stand up there for life, forever, I was advised.

* * * * * * *

[fol. 995] STANLEY M. SHARTLE, a witness heretofore called by the defendant, whose cross-examination was interrupted, pursuant to agreement, to permit Witness Willard Stein, to testify, recalled to testify on Cross Examination.

Cross examination.

By Mr. Thorpe:

Q. Now, Mr. Shartle, again referring to Defendant's Exhibit "B", I think you testified that this diagram repre-

sents what one would see if he were standing on the north-south runway looking south, is that correct?

A. Yes, prior to the construction of the Toll Road.

Q. Now, as a matter of fact, you don't pretend this is an ocular projection of what you would see if you were standing on the north-south runway looking toward the Toll Road?

A. No.

[fol. 996] Q. Now, actually, from a practical standpoint, the best representation of what the person could see would be an untouched photograph, isn't that right?

A. I don't know.

Q. You wouldn't know?

A. No.

Q. Well, you understand what I mean by an ocular projection?

A. Yes.

Q. Isn't a photograph an ocular projection?

A. Yes, it is.

Q. When you look at a photograph you have probably the best mechanical representation of what the eye can see that we know of, isn't that right?

A. I should say so.

Q. So, now, Mr. Shartle, I will now hand you what has been identified as Plaintiff's Exhibit 12, and ask you to look at it, and ask you if that does not appear to be a representation of the Toll Road from the end of the north-south runway, at the south end?

A. Yes, it appears to be.

Q. And that would appear to be a fair representation of what the eye could see, isn't it?

A. No, I can see more with the naked eye than this photograph reveals.

Q. You are sure about that?

A. Positive.

Q. You think something is concealed there?

A. Yes. Not concealed, I should say does not appear.

[fol. 997] Q. Let's get a little closer. I hand you what has been identified as Plaintiff's Exhibit 13, which would appear to be possibly a couple, three hundred feet closer, now, can

you see any more in that photograph than you could in the first one?

A. Yes, I can see greater details of grass.

Q. On the side of the Toll Road?

A. On the side of the Toll Road embankment.

Q. Indicating you are closer to it?

A. Yes.

Q. Now, I hand you what has also been identified as Plaintiff's Exhibit 14, and ask you if that doesn't fairly represent what the eye could see from the position in which the photograph was taken?

A. It's fairly representative, some of the details are not clear.

Q. You wouldn't say that photograph has been retouched.

A. I wouldn't know about that, I am unable to say.

Q. I ask you to look in the distance, down along the runway straight ahead, and ask you if you can locate on this photograph what you have referred to on Defendant's Exhibit "A" as Tanktainer Company building?

A. Yes, I see that.

Q. Where is it?

A. Right here.

Q. All right, indicating the small object at the end of the runway?

A. Yes, beyond the end of the runway.

[fols. 998-999] Q. Beyond the end of the runway, the small white object at the end of the runway?

A. Yes.

Q. That's the Tanktainer, isn't it?

A. Yes.

Q. Now, that in the photograph appears to be in true perspective, wouldn't it?

A. I should think so.

Q. Well, now, Mr. Shartle, again referring to Defendant's Exhibit "A", again referring to the lower drawing exaggerated portion of it, and the purported glide angles superimposed on it, I will ask you whether there is any line thereon which would indicate a glide angle for fifteen feet over the top of the Toll Road?

A. There is not.

Q. Now, would it be possible for you now to impose on this exhibit, by some appropriate designation, a line which would indicate fifteen feet over the top of the Toll Road?

A. It is possible.

Q. You could do that if you had a ruler?

A. It could be done.

Q. Likewise, you could point out a point on this chart which would represent fifty feet over the top of the Toll Road, couldn't you?

A. Yes.

Q. Would you do that?

• • • • • • •

[fol. 1000] A. There, I have marked two points, one fifteen feet above the Toll Road, and one fifty feet above the Toll Road at the north edge of the westbound pavement.

Q. How have you designated them?

A. The one fifteen feet above the pavement I have lettered fifteen feet above; the one fifty feet above the pavement I have designated as fifty feet above the Toll Road.

Q. Now, again referring to Defendant's Exhibit "A", and indicating again the portion with the dotted lines which purport to indicate a glide path or triangulation to the south end of the present runway—that's correct?

A. That's right.

Q. I will ask you if it isn't true that any obstructions which you have indicated there with respect to those triangulated lines, are west of the center line of the north-south runway?

A. Yes, sir, some are.

Q. Are there any that are east of the center line?

A. One is.

Q. Can you tell approximately how far east of the center line it would be?

A. Twenty-four feet.

Q. Now, there are other poles to the east, are there not?

A. Yes, there are.

Q. You didn't designate those on this chart, did you?

A. Not on the profile.

Q. They are somewhat lower, aren't they? Actually?

A. Yes.

[fol. 1001] Q. You just took the ones to the west?

A. Yes.

Q. Now, the highest obstruction I think here is the one farthest west, isn't it?

A. Yes, it is.

Q. Can you now tell us how far west it is of the center line of the runway?

A. Two hundred fifty-two feet west of the runway center line projected.

Q. That is just the top of it, ordinary telephone pole, what is designated as a telephone pole sticks up there, isn't it?

A. No, actually the top of a light that is mounted on the pole.

Q. On the top of the pole?

A. No, the mounting is on the side, and the mounting then projects above the pole.

Q. My recollection of that pole, correct me if I am wrong, the pole which is farthest west, as I recall, had a stub sticking up in the air over the top of anything it carried, am I wrong about that?

A. May I ask you a question?

Mr. Thorpe: Certainly.

Witness: Are you talking about the westernmost obstruction light pole?

Q. The most western obstruction pole.

A. The one which is 252 feet west of the center line of the runway?

[fol. 1002] Q. That might be, I think it is about that far.

A. The light is the highest thing on the whole assembly.

Mr. Thorpe: I think I will have to apologize, I think you are right about that, I think the tallest one to the west of the runway has an obstruction light on it.

Q. And with reference to that particular point, I again hand you Plaintiff's Exhibit 12, and indicate what appears to be a light on the pole ahead of the truck, that would be indicated as being the tallest obstruction there, wouldn't it? These are getting shorter, another one over here.

A. It is so dim I can't see the others in order to compare it.

Q. The one ahead of the truck is the farthest west obstruction light, the others have no light on them, is that right?

A. I am unable to see but one obstruction light for sure owing to the dimness. I am afraid I am unable to answer that.

Q. Well, anyway, it isn't too important. Now again referring you to Exhibit "A", and the lower part on the exhibit, elevations, you have not imposed, or attempted to delineate on this chart any line which would run from the top of the power line, that is to say, the power transmission line for the South Shore Railroad, to the end of the runway, have you, while that would be carried by catenary?

A. No, I have drawn no glide slope from the wires down at that point.

Q. Now, Mr. Shartle, I hand you what has been identified [fol. 1003] as Defendant's Exhibit "C", and ask you again to examine it, and I will ask you now if, with reference to this exhibit, that is the same exhibit which you designated as a chart, is that correct?

A. Yes, it is.

Q. Now, I notice, Mr. Shartle, that you have set up here ten different triangles, right angle triangles, is that correct?

A. Yes.

Q. On the sides of the triangles you have imposed certain measurements, is that correct?

A. Yes.

Q. Now, there is no pretense now on your part that these triangles represent the measurements which are imposed upon the so called chart, is there?

A. Triangles not drawn to scale?

Q. Each of the triangles appear to be about thirty, sixty, ninety degree triangles, aren't they?

A. Yes.

Q. So that all that they indicate on there is simply triangle?

A. That's right.

Q. They in no wise attempt to indicate the proper angles which would be the result of these calculations which you have placed on the chart, would they?

A. No.

Q. Now, as I understand Defendant's Exhibit "C", it rightfully ties into Defendant's Exhibit "A", and is nothing [fol. 1004] more nor less than an arithmetic calculation which you have composed for the court's information.

A. Yes, that's true.

Q. Now, with respect to each of these exhibits, Defendant's Exhibit "A", "B", "C", those exhibits are representative of what you saw this Spring when you were out there making that survey, isn't that true?

A. Yes.

Q. And particularly with respect to what you designate here as the Tanktainer Building, I will ask you if that building is correctly described on the lower part of this chart, that is to say, Defendant's Exhibit "A"?

A. Yes.

Q. That is, but the height of the building is exaggerated ten times, isn't it?

A. The scale is ten times greater.

Q. The net result of it is, with respect to that particular exhibit, the height of the building is exaggerated ten times, isn't it?

A. Yes.

Q. So that to get the relative height, with respect to horizontal measurements, you would have to subtract nine points off of it wouldn't you?

A. Yes, that's right.

* * * * * * *

[fol. 1005] Redirect examination.

By Mr. Houran:

Q. Mr. Shartle, on direct examination I think you testified, referring to Defendant's Exhibit "A", as to what a profile drawing was. Was that definition entirely correct that you testified to on direct examination?

A. I believe not.

Q. Could you correct it at this time? I notice in reference—

Mr. Thorpe: If your honor, please, he did correct it.

The Court: For the purpose of the record, he may answer.

Q. Do you recall the definition you gave for a profile drawing on direct examination?

A. Approximately, yes.

Q. Do you now feel that was a correct definition?

A. I believe it had an extra word that shouldn't be there.

Q. Now, based on your engineering experience, can you give the court what you consider would be a correct definition of Profile Drawing?

A. Yes.

Q. Would you do that, please?

A. I should say that a Profile Drawing is a side view, or elevation at right angles to the object being viewed.

Q. Now, this type of profile would be what you would then call two scale profile, is that correct?

A. It is.

Q. As I recall you testified on direct examination there were two scales on this profile?

A. Yes.

[fol. 1006] Q. Your drawing shows those scales, is that correct?

A. Yes, it does.

Q. What is your horizontal scale?

A. One inch equals one hundred feet.

Q. What is your vertical scale?

A. One inch equals ten feet.

Q. Why did you put two different scales on Defendant's Exhibit "A".

* * * * * * *

A. Owing to the extent of the area surveyed I had only two alternatives as to how the survey might be depicted on a drawing; either I draw the profile in its exact scale, that is, one having the same vertical scale as the horizontal scale, or, I could increase the vertical scale over the horizontal scale in order to better show the details of the

survey; otherwise the drawing would have been immense in size.

Q. Now, assume you made both vertical and horizontal scale one inch equals ten feet, how long would this drawing then have been?

A. It would have been ten times its present size. It is about six feet long, therefore, its length would be sixty feet.

Q. Now, Mr. Shartle, if you had made the vertical scale the same as the horizontal scale, how high would the obstructions at the south end have been?

[fol. 1007] A. Well, if it was drawn to scale, one inch equals one hundred feet, the obstruction lights would be not over three-quarters of an inch to an inch tall; the catenary support poles would be perhaps one-quarter inch to one-half inch tall, and the Northern Indiana Public Service Company power transmission poles would be even shorter than the catenary support poles.

Q. If both vertical and horizontal scales had been one hundred to one, would there be any relative change, as far as proportionate height goes, between NIPSCo high tension line obstruction poles and the catenary support and the Toll Road?

A. They would all be in the same proportion.

Q. I will ask you whether or not the figures you have designated glide angles would in any way be changed?

A. No, those would remain the same.

Q. Now, Mr. Thorpe, pointed out to the court that you only placed two obstruction light poles on this drawing; that is correct, is it not?

A. You are speaking of the Profile, yes.

Q. Why was that done?

A. To place all of the obstruction lights on the drawing would crowd the drawing; perhaps obscure necessary detail.

Q. Why did you choose those particular lights to place on the drawing?

A. Those were the lights which were nearest to the center line of the north-south runway projected.

[fol. 1008] Q. Now, from the light that has the dotted

line, can you tell us where that obstruction pole is in relation to the center line, projected, of the runway?

A. It's eighty-nine feet west of the north-south runway, center line, projected.

Q. The obstruction light pole which appears to be the highest does not have a broken line running from it, isn't that correct?

A. Yes.

Q. Where is that pole located?

A. That pole is two hundred fifty-two feet west of the center line of the north-south runway, projected.

Q. I will ask you whether or not the relative position of all four obstruction light poles are shown any place here on the plan, or profile of Defendant's Exhibit "A"?

A. Yes, they are shown on the plan.

Q. Would you indicate that to the court, please?

A. There is one, two, three, four, obstruction light poles included in the survey.

Q. Now, you are acquainted with what has been identified and offered, and received in evidence as Defendant's Exhibit "C", isn't that correct?

A. Yes.

Q. Ask you whether or not Defendant's Exhibit "C" shows the elevation of all four of the obstruction lights?

A. Yes, it does.

Q. Now, once again, Mr. Shartle, referring to Defendant's Exhibit "A", if both the horizontal and vertical [Tol. 1009] scale were the same, what would be the, what you could probably call the side angle, or edge of the Toll Road; would it appear as steep as it does in this drawing?

• • • • • • • •

A. The slopes under those conditions, drawn under those conditions would be much flatter than appear on this exhibit.

Q. And what would that slope be, if you know?

A. The slope is two to one, or, in angular value, from the horizontal it is twenty-six and one half, approximately.

Q. Mr. Shartle, I hand you what has been identified and offered in evidence as Plaintiff's Exhibit 15, and ask you if any place on this drawing there is any reference to either a vertical or horizontal scale that you can determine?

• • • • • • •

[fol. 1010] Q. Do you have a scale on Plaintiff's Exhibit 15?

A. No, I don't.

Q. I will ask you if you can ascertain what the scale, vertical and horizontal of the profile of this drawing is?

A. Yes, the scale could be determined.

Q. Would you do it please, of the profile?

A. The horizontal scale of the profile is one inch equals two hundred feet, and the vertical scale is one inch equals twenty feet.

Q. So, in respect to these two drawings, referring now to Plaintiff's Exhibit 15 and Defendant's Exhibit "A", the only difference is that Defendant's Exhibit "A" is over all twice the size of Plaintiff's Exhibit 15, isn't that correct?

A. That is right.

[fol. 1011] Recross examination.

By Mr. Thorpe:

Q. Now, Mr. Shartle, again referring to Defendant's Exhibit "A", if I understand your testimony correctly; now that you have testified that the reason for using a dual, two scales, one of the reasons was to keep the drawing on the chart, which you chose for size, isn't that right?

A. Well, it was to show a maximum of detail on as small a sheet as would be feasible.

Q. I think you further said a profile was to demonstrate from a right angle certain measurements which were imposed thereon, I am not giving your exact words but what I understood you to mean?

A. Yes.

Q. Now, then, particularly with respect to your use of the word, right angle, I am exhibiting again to you Plaintiff's Exhibit "A", rather Defendant's Exhibit "A", and I will ask you to indicate where the focal point of this drawing would be, approximately, with respect to this drawing and your projection, where would be the focal point of your measurements?

A. I don't understand what that means, sir.

Q. If you were standing off in the distance, looking at it, approximately at right angle from this drawing, where would you be?

A. At infinity.

Q. By infinity you mean any place from directly in front of it back as far as you could see?

[fol. 1012] A. No, I didn't mean indefinitely, at an infinite distance.

Q. Now then by that you mean that this is a flat projection you don't have a focal point at all, is that what you are trying to say?

A. Yes, that is right.

Q. So that you could stand in front of it at any particular point and the measurements would be approximately correct, having in mind your dual scale?

A. The only point at which it could be properly viewed on the ground would be at a distance of infinity.

Q. Isn't any place you could view this if it were laid on the ground you would get a prospective at all, that's right?

A. That's right.

Q. This is a flat projection and doesn't pretend to be a polyconic projection, anything of the kind?

A. No.

Q. Now, by polyconic, I am speaking of that sort of projection—we are attempting a projection the eye sees, isn't that correct, or approximate?

A. It approximates it, yes.

Q. So, after all the flat drawing does not pretend to illustrate what the eye would see, it is a measurement drawing?

A. Yes, it is.

Q. So we get right back to the same premise I demonstrated a while ago, if you want to approximate what the eye would see you have to have a photograph, or you would [fol. 1013] projected along some other project other than what you have here?

A. Yes.

Q. Now, counsel asked you about Plaintiff's Exhibit 15. Again referring to it, there is no attempt to indicate on this chart, except at the top of it, the position of the obstructions with reference to the end of the north-south runway, is there?

A. No, not so far as dimension is concerned.

* * * * * * *

Redirect examination.

By Mr. Houran:

Q. Mr. Shartle, directing your attention once again back to Plaintiff's Exhibit 15, I will ask you if the obstruction light poles are in any way plotted on this profile?

A. Yes.

Q. How are they plotted?

A. They are plotted by small circles, accompanied by the notation five temporary light poles ELF 538-652. Correction, the notation is, five temporary light poles elb 638-652.

* * * * * * *

Recross examination.

By Mr. Thorpe:

Q. And these poles are shown in proper relative position with respect to the drawing, aren't they?

A. I didn't check from that standpoint.

[fol. 1014] Q. You didn't look at it from that standpoint?

A. Not from their positions.

Q. Keep the question in mind and look at it again, please?

A. Are you speaking of horizontal position?

Q. Yes.

A. Yes, they are drawn approximately correct.

* * * * * * *

Howard B. Wodock called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Houran:

* * * * * * *

Q. What is your business, or occupation?

A. Professional engineer.

* * * * * * *

[fols. 1015-1025] Q. For whom do you work now?

A. Indiana Toll Road Commission.

Q. What position do you hold with the Indiana Toll Road Commission?

A. Technical and administrative assistant to the chief engineer.

Q. How long have you held that position?

A. About three years.

Q. How long did you say you have been with the Toll Road altogether?

A. About six years.

• • • • • • •

[fol. 1026] Cross examination.

By Mr. Thorpe:

• • • • • • •

Q. Now, all of these engineering drawings, ours and [fol. 1027] yours, so far as you can say from an engineering standpoint are approximately correct, aren't they?

A. Yes.

Q. All of them, everybody's work, that is with respect to these engineering drawings?

A. Yes.

• • • • • • •

[fol. 1028] Q. Now, referring to Defendant's Exhibit "B", I will ask you what was the fact, with respect to your observation, visual observation, made—pick out March 7th, 1960—when you were out there, you were standing on the end of the runway, and now, with reference to Defendant's Exhibit "B", I will ask you if you would be able to see any of these wires and obstructions?

A. Yes.

Q. What part of those obstructions would you be able to see?

A. You would be able to see the top of the obstruction lights, and I believe you would probably be able to see the tops of certain catenary support poles.

Q. As a matter of fact all you would be able to see would be just the tops of some of the poles over the top of the Toll Road, wouldn't you?

[fol. 1029] A. If I were standing on the south end of the north-south runway, yes.

Q. You would be unable to see anything, for all practical purposes, below the obstruction lights, isn't that right?

A. No, sir, I don't believe that is entirely correct.

Q. I hand you what has been identified Plaintiff's Exhibit 13; now, you are familiar with the territory there south of the runway, are you not?

A. Yes.

Q. You recognize the objects there in this photograph, do you not?

A. Yes.

Q. And assuming the photograph was made with the camera at eye level of the average height man, I will ask you now, observe the photograph and tell me if you can see any power line in that photograph which you have shown here in the profile, defendant's Exhibit "B".

* * * * * * *

A. No, I cannot see any.

Q. All right, so, obviously, they are concealed there behind the Toll Road bridge, is that right?

A. Possibly.

[fols. 1030-1118] Q. Well, let's see, I will ask you to carefully look at this exhibit again and ask you if all you can see over there isn't the top obstruction lights?

A. I don't know, sir, all obstruction lights, the photograph is not perfectly clear, sir.

Q. Just a minute. Will you answer my question. Read the question to him.

(Question read.)

A. No.

Q. What else do you see then with respect to any wires or power line, or anything, over there?

A. I see what appears to be one, two, three, four, five, six, seven, eight, nine, ten, eleven obstructions of some nature appearing above the Toll Road.

Q. Now, with respect to trucks which are depicted on top of the Toll Road here, what you point out now are approximately the height of the wheels of those trucks, aren't they?

A. From that angle, yes.

Q. We are not talking from any other angle except this photograph, are we?

A. I can only tell you, Mr. Thorpe, what I see, sir.

Q. It is all with reference to this particular photograph which has been identified as Plaintiff's Exhibit 13, isn't that correct?

A. Yes.

* * * * * * *

[fol. 1119] GEORGE CHACHARIS, called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Purvis:

* * * * * * *

Q. Mr. Chacharis, what position, if any, do you hold with the City of Gary, Indiana?

A. I am the Mayor.

Q. When were you elected Mayor of Gary?

A. Last year.

Q. You took office on January 1st, 1959?

A. For this term I took office on January 1st, 1960, but I began serving as Mayor, July 16th, 1958.

Q. Before you began serving as Mayor, in 1958, did you hold any other position with the City of Gary.

[fol. 1120] A. I was City Comptroller for approximately five and a half years prior to becoming Mayor.

Q. When did you first take office as City Comptroller?

A. January 1st, 1953.

Q. When does your present term of office expire?

A. December 31st, 1963.

* * * * * * *

Q. Now, do you recall that there were some negotiations with the Chicago South Shore and South Bend Railroad

regarding obstruction lights south of the South Shore Railroad on the south approaches to the north-south runway of the Gary Airport, do you recall any such negotiations?

A. I do, sir.

Q. I will ask you if you had any part in the negotiations with the South Shore Railroad?

A. I did.

Q. What was your part in those negotiations?

A. Well, as a member of the Board of Public Safety, Public Works and Safety I received some requests from the South Shore Railroad line which I refused to grant until they negotiated with the Airport Commission to [fol. 1121] withstand and defray the expenditures for installing obstruction lights south of the South Shore railroad on the approaches to the north-south runway of the airport.

* * * * * * *

[fol. 1122] Q. What is the position, and location, and height of those poles with respect to the height of the Toll Road at that point?

* * * * * * *

[fol. 1123] A. The position of the poles is in direct line with the north-south runway of the airport, and the lights are higher than the Toll Road, and they are higher than the railroad.

* * * * * * *

[fol. 1124] Q. Now, Mr. Chacharis, I am going to show you what has been identified as Plaintiff's Exhibit 3-A, and ask you if you know what it is?

A. Why this is the lay-out of the Airport.

Q. Would you locate the north-south runway, if you can, on that map? Do you know whether or not there are any structures located immediately north of the north-south runway?

A. Yes, sir.

Q. What are those structures?

A. Tanktainer Corporation is located immediately to the north of the highway and the north-south runway.

Q. That's Industrial Highway?

[fol. 1125] A. Yes, sir. In addition to that this entire area—

* * * * * * *

Q. Do you know any other structures, Mr. Chacharis, within the area of this circle which is drawn on this zoning map?

Mr. Thorpe: What circle are you talking about with reference to the record now?

Mr. Purvis: For the record, I am pointing to the outer boundary of the area which is purported to be zoned by the zoning map.

A. The entire area to the north, to the east and to the west is zoned for industry; there are many industrial structures.

Q. What particular industrial structures of which you have personal knowledge are in that area?

A. We have the Universal Atlas, Portland Cement plants, which has many stacks; there is the NIPSCo Power generating station which has—

Mr. Thorpe: You just tell us what the buildings are; he tells us the building and makes a speech; I object to the speech part of his answers.

The Court: Mr. Witness, confine your answer to the building itself.

[fol. 1126] Mr. Chacharis: Your Honor, I was asked what structures, a stack is a structure, in my opinion. I answered the question along that line.

Q. Continue with the answer if you know of any other structures in that area.

A. I was asked what structures, do you want me to answer that question as to structures?

Q. Yes.

A. There is NIPSCo Generating Station with those two huge stacks—

* * * * * * *

A. There is the E. J. & E. high line east of it, Grasselli plant east of it, Cudahy Plant to the east of it; there is

the South Shore high line to the south of it, and many others.

Mr. Thorpe: Move to have the last part of the answer stricken.

The Court: It may go out.

Q. Now, south of the Airport you have testified, Mr. Chacharis, within the area of the circle, what is the character of that area?

* * * * * * *

[fols. 1127-1130] A. The area to the south of the Airport is comprised of marshes, the Calumet River, also the high line South Shore Railroad.

Q. South of that particular area?

A. Residential area.

Q. So that on one side you testified would be on the south side residential, the other three sides industrial, is that correct?

A. Absolutely correct.

* * * * * * *

[fols. 1131-1132] Q. Mr. Chacharis, during the time that you have been City Comptroller, was there ever any discussion with the South Shore Railroad people, or conversations, or negotiations with you with respect to removing those obstruction poles about which you have testified?

A. The poles that are now there?

Q. Yes.

A. Why, no. The present poles they are there—

* * * * * * *

[fol. 1133] Q. Now, you testified, Mr. Mayor, that the South Shore never entered into any negotiations with you while Mayor or City Controller to remove those poles, did the South Shore Railroad officials, anybody of the South Shore, any of the South Shore Railroad officials, while you were City Controller, ever enter into negotiations with you or discuss with you, following the election, those poles, any South Shore official enter into a discussion with you with respect to shortening the poles?

A. No, sir.

[fols. 1134-1155] Q. Did any South Shore official during the period you have been Mayor, during the time you were Mayor, has any official of the South Shore Railroad entered into any negotiation, discussed with you to shorten the poles?

A. No, sir.

Q. Has anyone while you were City Controller, after the poles were erected, did anyone enter into negotiations or discussion with you for the purpose of shortening those poles?

A. No, sir.

Q. Has anyone during the time you were Mayor of the City of Gary, has anyone entered into any negotiations, or discussions with you for the purpose of shortening the poles?

A. No, sir.

* * * * * * *

[fols. 1156-1157] HUBERT RICHARDSON called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McMahan:

Q. Will you state your name, please?

A. Hubert Richardson.

Q. Where do you live, Mr. Richardson?

A. LaPorte, Indiana.

Q. What is your profession or occupation?

A. Detective Sergeant with the Indiana State Police.

[fol. 1158] Q. How long have you been a member of the Indiana State Police?

A. Sixteen years.

Q. What are your duties as Detective Sergeant with the Indiana State Police?

A. Besides investigating criminal cases, I also do the Photograph work for our district, which is known as District Ten.

* * * * * * *

Q. Are you familiar with the location of the Gary Municipal Airport with reference to its location at the Toll Road?

A. Yes, sir.

Q. I will ask you if you have taken photographs at that location?

A. Yes, sir.

Q. When did you take these photographs?

A. April 26th.

Q. Of this year?

A. Of this year.

Q. I will hand you what has been identified as Defen- [fol. 1159] dant's Exhibit "V", and ask you to look at it. Have you looked at Defendant's Exhibit "V"? Can you tell us what it is?

A. That is a print I made from the negative that I shot with my camera sitting on the north side of the Indiana Toll Road, facing south with it centered with the center line of the north-south landing strip of the airport.

Q. This is a picture that you took, developed and printed on April 26th, 1960?

A. Yes, sir.

Q. And that is a view to the south—

Mr. Thorpe: Just a moment. Let nim tell us what it is or I must object.

A. This is a view looking south, as I said before, with the camera on the north side of the road, facing south: this is the picture that was on the negative when I exposed it, looking south across the Indiana Toll Road and the South Shore Railroad Track.

Q. Did you use a tripod in taking that picture?

A. Yes, sir.

Q. Where was your tripod?

A. Sitting on the berm, extreme north berm of the Indiana Toll Road.

Q. Where was the tripod with reference to the center line of the north-south runway?

A. Centered up with it directly.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "V".

Mr. Thorpe: No objection.

[fols. 1160-1161] The Court: Defendant's Exhibit "V" May be admitted in evidence.

• • • • • • •

[fols. 1162-1163] Q. Now, Mr. Richardson, I will hand you what has been identified as Defendant's Exhibit "W", and ask you to examine it. Have you examined it? Can you tell the court what that exhibit is?

A. That is an 8 x 10 print of another negative that I exposed with the tripod remaining in the same position as it was when I took the picture for Exhibit "V", with the exception I turned the camera to the right, or to the west, and took the picture in that direction. This also shows the Indiana Toll Road and South Shore Railroad and poles and so forth in the background.

Q. This was taken the same day?

A. The same day, a few minutes after the other one was taken without moving the tripod, just angling the camera, just moving the camera on the tripod.

Mr. Thorpe: May I look at the other exhibit just a moment. No objection.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "W".

The Court: Defendant's Exhibit "W" is admitted in evidence.

• • • • • • •

[fols. 1164-1265] Q. Now, Mr. Richardson, I hand you what has been identified as Defendant's Exhibit "X", and ask you to examine the same. Have you examined it. I will ask you to state to the court what it is.

A. That is an 8 x 10 print that I made from the negative I exposed at the same location, a few minutes after the other two were taken, with the exception the camera was angled to my left or in an easterly direction; the tripod remained in the same position for all three shots.

Q. And this shows the Indiana Toll Road.

A. And the South Shore Railroad in the background.

Q. Like the other two exhibits, you exposed the picture, developed and printed this print?

A. Yes, sir.
Q. On the same day?
A. Yes, sir.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "X".

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "X" is admitted into evidence.

* * * * * * *

[fol. 1266] TURNER CURRAN called as a witness by the Defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Houran:

Q. State your name to the court, please.
A. Turner Curran.

* * * * * * *

[fol. 1267] Q. I will ask you whether or not you were, or are, employed by the Gary Municipal Airport Board, or the Gary Aviation Board?
A. Yes.
Q. In what capacity, sir?
A. For the design of the Gary Municipal Airport.
Q. When did this employment commence, if you can recall?
A. I believe, I might be mistaken, forty-eight or forty-nine.
Q. Are you still engineer for the Gary Municipal Airport?
A. Yes.
Q. Now, you stated something about drawing plans for the airport, did you?
A. It was done under my supervision, yes.
Q. Those would be the lay-out plan, zoning map already in evidence?

A. That is right.

[fol. 1268] Q. I will ask you whether or not you ever designed or drew plans for obstruction lights for the Gary Municipal Airport?

A. Yes.

Q. And, at whose direction was this done, if you can recall?

A. At the direction of the Aviation Commission.

Q. Did you in fact draw such plans?

A. Yes.

Q. And do you recall about when?

A. I believe they were drawn in 1954, I believe.

Q. Now, in compliance with these plans were the obstruction lights installed?

A. Yes.

Q. Do you remember about when they were installed, was that in about fifty-four?

A. No, I believe they were installed the following year.

Q. I will ask you, Mr. Curran, what is the fact as to whether or not these obstruction lights were designed to be permanent installation?

• • • • • • •

[fol. 1269] A. The obstruction lights were designed to cover or to protect the obstruction of the South Shore Railroad; the obstruction lights were intended to be as permanent as the South Shore is, fairly permanent.

• • • • • • •

[fol. 1270] Q. Mr. Curran, based on your employment, and other experience in the field of engineering, do you have an opinion as to what the limiting obstruction of the north-south runway of the Gary Municipal Airport is, specifically regarding the south end of this runway?

• • • • • • •

A. Yes.

Q. What is that obstruction?

• • • • • • •

[fol. 1271] A. At the present time the limiting obstructing would be the obstruction light on the south end of the north-south runway.

Q. I will ask you, Mr. Curran, whether or not this was a limiting obstruction prior to the construction of the Toll Road?

* * * * * * * *

[fols. 1272-1274] A. Yes.

* * * * * * * *

[fols. 1275-1276] Cross examination.

By Mr. Thorpe:

* * * * * * * *

[fol. 1277] Q. Now, any man with spurs on could go up [fol. 1278] that pole, lift the lights off, and with a buck saw, or any other kind of saw, saw it off in three minutes at least, couldn't he?

A. Possibly.

Q. And lower the lights, if necessary?

A. Yes.

Q. Or could go down to the ground, cut it off twenty-three feet from the ground and put lights on top of that, couldn't he?

A. That is right.

Q. How many poles are there there?

A. I have forgotten.

Q. Six, aren't there?

A. I believe, I am not sure.

Q. A half days work, it wouldn't be too much work for two or three fellows to go out there and drop those lights down, if necessary, would it?

A. That would depend on who was doing it.

Q. I guess that is right, but suppose I am a hard worker, so are you, suppose you and I put spurs on, in half a day could we cut the poles down?

A. I wouldn't do it myself.

Q. Anybody skilled climbing up a pole wouldn't have too much trouble lowering the lights?

A. No, they could be lowered, I don't want to say how much time it would take.

Q. Well, now, obstruction lights, do you understand the purpose of obstruction lights at a runway?

[fol. 1279] A. I believe I do.

Q. What is your understanding of the purpose of obstruction lights?

A. I would say an obstruction light is to warn a plane that there is an obstruction in that vicinity, and in this particular instance it is in the glide path of the runway, so the obstruction light is placed to warn incoming pilots, or those going out, that the South Shore is an obstruction, stay above it.

Q. There is some obstruction there?

A. That is right.

Q. Wouldn't necessarily mean a temporary or permanent form of obstruction, should not fly in.

A. That is right.

Q. That is the purpose of the obstruction light?

A. That is right.

Q. When the obstruction is no longer there there is no reason for the light?

A. None whatever.

Q. Now, that Toll Road embankment is a pretty solid affair isn't it?

• • • • • • •

[fol. 1280] A. I would say yes.

Q. It isn't readily removable is it, I mean, you just wouldn't remove it in two or three days, would you?

A. There again it depends on the type of equipment and men you get in there.

Q. Anyway, this Toll Road is a grade which is a solid embankment, isn't it?

A. Yes.

Q. Do you now know whether the Toll Road, and the poles on top of it, are higher than the South Shore, or not?

A. From my own knowledge, as far as actually going out to survey, they do not; some plans I have seen, yes, in some spots the Toll Road, this is only from plans I have seen, it is not from my own engineering investigation.

Q. You haven't been down on the runway and looked at the obstruction lately, have you?

A. Not recently, no.

Q. Have you ever been down there?

A. Yes.

Q. Have you observed whether the Toll Road at the end of the runway, and poles, and traffic, on top of it, is higher than the South Shore and the appurtenances to the South Shore?

A. It appears the road bed, this is again appearance, that the road bed in some spots is higher than the road bed of the South Shore.

Q. Mr. Curran, upon that subject I hand you what has been identified as Plaintiff's Exhibits 12, 13 and 14, hand [fol. 1281] them to you in that order and ask you to examine each of them. Now, you have examined these exhibits, sir?

A. Yes.

Q. I will ask you if those would appear to be fairly correct, true representations of the scene which they depict?

A. Yes, from the spot in which they were taken, yes.

Q. Would these exhibits refresh your recollection now as to whether the Toll Road grade would be higher than the South Shore Railroad and its appurtenances?

A. Not entirely, no; I believe in some places it is lower, some places higher. I do not know from my own engineering investigation.

* * * * * * *

[fol. 1282] Mr. Houran: The defendant will now offer into evidence that which has been marked Defendant's Exhibit QQ, which is a certified copy of a record called "Airport Facilities Record", which is a record of the Aeronautics Commission of the State of Indiana, certified to as such. This record is dated January 30th, 1953, and we are offering it for the purposes of showing the listed obstructions and glide angles to the north-south runway prior to the construction of the Toll Road, and also to show that the northwest, southeast runway is expandable one thousand feet.

* * * * * * *

[fols. 1283-1285] The Court: It might be considered a public record. I will admit it in evidence only as a part of the overall picture to give it such weight as might be deserved on the overall picture. Defendant's Exhibit QQ may be admitted in evidence.

• • • • • • •

[fols. 1286-1287] Mr. Houran: The defendant now offers into evidence what has been marked, for purposes of identification, Defendant's Exhibit RR, which is a certified copy of an Airport Facilities Record on file in the office of the Aeronautics Commission of Indiana, which said record is dated June 21st, 1957, and is offered into evidence for the purpose of showing the glide angles on file in the office of the Commission, and what obstructions are at the ends of the north-south runway after construction of the Toll Road.

• • • • • • •

The Court: I am going to let it go in for the same purposes as I stated before.

• • • • • • •

[fol. 1288] Robert Laughery called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Houran:

Q. Would you state your name to the court, please?
A. Robert Laughery.
Q. Where do you live?
A. Valparaiso.
Q. Married?
A. Yes, sir.
Q. Do you live in Valparaiso with your family?
A. I do.
Q. What is your business, or occupation?
A. Surveying and airport manager.

Q. What airport do you manage?
A. Porter County Municipal.

. . . . . .

[fol. 1289] Q. Did you subsequently graduate from Purdue?
A. Yes.
Q. What year did you graduate?
A. 1947.
Q. What did you graduate in?
A. School of Air Transportation, Airport Manager Division..

. . . . . .

[fols. 1290-1291] Q. What branch of the service did you go in?
A. U. S. Army Air Corps at the time.
Q. That is what is now known as United States Air Force?
A. That is correct.
Q. All right, what year did you go to cadet school?
A. 1943.
Q. Did you subsequently graduate from Cadet School?
A. Yes.
Q. What type planes did you fly during the course of your cadet training?
A. Standard primary trainers, basic trainers, PY19, BT13 UC78 twin engine, graduated in B25.

. . . . . .

[fol. 1292] Q. How many hours have you had in aircraft over fifteen thousand pounds?
A. Over fifteen thousand, I would say it is in the neighborhood of twenty-three hundred to twenty-five hundred hours.
Q. Those hours you received since you went in the Air Corps up to the present time?
A. That is correct.
Q. You are still actively engaged in flying in the Air Force Reserve?
A. I am.

Q. When was the last time you flew for them?

A. The last time, last Thursday and Friday.

Q. Where did you fly at that time?

A. C119 box car.

Q. Bob, I will ask you what type planes you put your twenty-three hundred hours in?

A. As I stated before, some in B25, A26, Douglas A26, C47, C46's, C119, I am not sure if the Twin Beech gross is over fifteen thousand pounds or not.

Q. What type civilian license do you hold?

A. Commercial pilot rating, with instrument rating attached to it.

Q. You also have hours in light planes?

A. Quite a few.

Q. Have any idea how many?

A. Around two thousand I believe.

* * * * * * *

[fols. 1293-1299]. Q. I will ask you, Mr. Laughrey, if you are familiar with the Gary Municipal Airport?

A. In what way?

Q. Have you ever flown in and out of it?

A. Yes, I have ever flown in and out of it in a plane that grossed more than fifteen thousand pounds?

A. I have flown out of it.

Q. In what kind of a plane?

A. C46.

Q. I will ask you if you have ever flown in and out of that airport in a light plane?

A. Yes, I have.

Q. When was the most recent time?

A. Approximately three weeks ago, three or four.

Q. You are then familiar with the Gary Municipal Airport, the obstruction to the runway.

A. To the runway used at that time.

* * * * * * *

[fol. 1300] Q. Once again, Bob, with your experience as a pilot, familiar with the Gary Municipal Airport, referring particularly to the south runway, the obstruction at the end of the south runway, what do you feel is the limiting obstruction to the south end of the north-south runway?

* * * * * * *

A. Well, during take-off roll, or landing, you always try to clear the highest obstruction in the direct path of the aircraft, and, in this case here, the most noticeable thing at the south end of the runway during take-off is the obstruction lights.

Q. Your answer to that would be the obstruction lights are the limting factors on the north-south runway?

[fol. 1301] A. That is correct.

Q. Now, Mr. Laughrey, assume the obstruction lights were down, do you have an opinion what would be the limiting obstruction to the north-south runway?

A. If I remember correctly, high tension wires, there are quite a few, catenary system wires over the South Shore out there, they were visible.

Q. You think that would be the next limiting factor to the north-south runway, is that right?

A. Yes, sir, it would.

Q. Do you know the approximate number of wires down there at the south end of the runway?

A. Quite a number of them.

Q. Do you have an idea of the approximate number of them? I think the evidence has been about thirty-four.

A. Thirty or forty, somewhere in there I judge.

Q. The evidence also has been part of those wires make up a high tension line comprising a total of around forty thousand volts.

* * * * * * *

Q. Assume further at the end of the runway, Mr. Laughrey there are double catenary systems, consisting of about eight wires, you are familiar with that catenary system are you not?

[fols. 1302-1332] A. To the extent I have seen it from the ground, yes.

Q. I will ask you, based on your experience, if you feel you could safely penetrate that cluster, group of wires in an aircraft such as a DC-3?

A. Safely penetrate it, no.

* * * * * * *

[fols. 1333-1339] HAROLD ZWEIG called as a witness by the defendant, having been previously sworn, testified as follows:

* * * * * * *

[fols. 1340-1343] Cross examination.

By Mr. Thorpe:

* * * * * * *

[fol. 1344] Q. You know finally, in August, an agreement between the City of Gary and the Toll Road with respect to the location of the Toll Road was reached, and the City [fol. 1345] was paid a large sum of money, you recall that, don't you?

A. Yes, sir.

Q. Now, I will ask you if you don't also recall the only thing mentioned in that agreement was matters pertaining to the east-west runway?

A. As I recall, all of the discussions were with respect to the east-west runway, and that this was incorporated in the agreement.

Q. Well, as a matter of fact that was the chief concern of both of these meetings, what was going to happen with the east end of the east-west runway?

A. Yes, sir.

* * * * * * *

[fol. 1346] Redirect examination.

By Mr. Houran:

Q. Mr. Zweig, did I understand you to say on cross examination the chief concern was the east-west runway?

* * * * * * *

A. Yes, sir.

Q. Why was that?

* * * * * * *

[fols. 1347-1372] A. We were primarily concerned with the east end of the east-west runway because the location

of the Toll Road as originally planned formed an obstruction, an additional obstruction to the Airport which we did not have previously. Now, the reason our discussion centered around the east-west, not north-south, is that the north-south runway already had obstructions over which the Toll Road did not offer any additional obstruction and that in all our discussions we knew that the obstruction on the north-south runway, existing obstructions were greater than what the Toll Road would provide.

* * * * * * *

[fol. 1373] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1374] IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 1

/s/ ROBERT W. DAVIS
48-1410

/s/ OSCAR L. CONWAY

/s/ HAROLD STACK

ORDINANCE NO. 2376

AN ORDINANCE CONCERNING THE ACQUISITION, IMPROVEMENT, OPERATION AND MAINTENANCE OF AN AIRPORT FOR THE CITY OF GARY, LAKE COUNTY, INDIANA

BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF GARY, LAKE COUNTY, INDIANA, as follows, to-wit:

SECTION ONE: That a necessity is hereby declared to exist for the acquisition, improvement, operation, and/or maintenance of an airport for the City of Gary, Lake County, Indiana, favors the acquisition, improvement, operation, and/or maintenance of an airport for such City under the provisions of Chapter 57 of the Acts of Indiana General Assembly, 1929 and all acts amendatory thereof and supplemental thereto.

SECTION THREE: That the City of Gary, Lake County, Indiana, hereby adopts the provisions of Chapter 57 of the Acts of Indiana General Assembly 1929 and all acts amendatory thereof and supplemental thereto, and that the City of Gary, Lake County, Indiana, shall acquire, improve and/or maintain an airport for said City of Gary, and a "Department of Aviation" of the City of Gary shall be established under and pursuant to the provisions of said Chapter 57 of the Acts of Indiana General Assembly 1929 and all acts amendatory thereof and supplemental thereto.

SECTION FOUR: This ordinance shall be in full force and effect from and after its passage by the Common Council and approval by the Mayor.

PASSED by the Common Council of the City of Gary, Lake County, Indiana, on this 16th day of October, 1939.

[fol. 1375]

/s/ M. J. HARTNETT
Presiding Officer

Attest: /s/ ANTHONY E. DOBIS, JR.
City Clerk

Presented by me to the Mayor for his signature and approval this 25th day of October, 1939.

/s/ ANTHONY E. DOBIS, JR.
City Clerk

Approved and signed by me this 25th day of October, 1939.

/s/ ERNST SCHAIBLE
Mayor of the City of Gary,
Lake County, Indiana

ORDINANCE INTRODUCED.
October 2, 1939

ORDINANCE SECOND READING.
October 2, 1939

FINAL PASSAGE OF ORDINANCE
October 16, 1939

[fol. 1376]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 2

[Handwritten notation—City of Gary—Legal Dept.—City Hall, Gary]

City of Gary
Legal eDpt.
City Hal., Gary

QUITCLAIM DEED

[Stamp—283596]

THIS INDENTURE WITNESSETH: That the RECONSTRUCTION FINANCE CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded pursuant to the provisions of Public Law 109, 79th Congress, approved on June 30, 1945, to all the rights and assets of Defense Plant Corporation, acting by and through the War Assets Administrator, under and pursuant to Executive Order 9689, dated January 31, 1946, and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765); and the powers and authorities contained in the provisions of the Federal Airport Act of 1946 (60 Stat. 170), and War Assets Administration Regulation No. 1, as amended, hereby quitclaims to the City of Gary, County of Lake and State of Indiana, and to its successors in function forever, hereinafter called the GRANTEE, for and in consideration of the development and operation of the herein demised premises as a public airport in perpetuity from the date hereof and for the benefit which shall accrue to the United States of America from the continued use of such property as an airport, the following described property situate in the County of Lake and State of Indiana, to-wit:

> Those lands incorporated in Reconstruction Finance Corporation project known as Tracts A and C of Plancor 1035, Rubber Synthetics, Gary, Indiana, (WAA No. R-Ind. 6), legally described as follows:

That part of the East One Half (E½) of Section Thirty-five (35), Township Thirty-seven (37), Range Nine (9) West, of the Second Principal Meridian, lying between the C.L.S. & E. Railroad and the Grand Calumet River, and that part of the West One Half (W½) of Section Thirty-six (36), Township Thirty-seven (37), Range Nine (9) West, lying between the U.S. Highway No. 12 and the Grand Calumet River, and that part of the Southeast Quarter (SE¼) of Section Thirty-six (36), Township Thirty-seven (37), Range Nine (9) West, lying between U.S. Highway No. 12 and the Grand Calumet River, and that part of the Southeast Quarter (SE¼) of Section Twenty-six (26), Township Thirty-seven (37), Range Nine (9) West, lying between the C.L.S. & E. Railroad and U.S. Highway No. 12, all in the City of Gary, Lake County, Indiana. Tract A is composed of 476.885 acres, and Tract C is composed of 133.971 acres. Total area is approximately 610 acres.

with all its appurtenances, being a part of the same property acquired by the Defense Plant Corporation under that certain Warranty Deed executed by the Gary Land Company, an Indiana corporation, dated August 25, 1942, and filed for record in the Recorder's Office of Lake County, Indiana, on October 9, 1942,

[Stamp—Key No. 40-175-1—NOT Taxable—Jun 7, 1947—/s/ STANLEY E. CLAZEWSKI—Auditor Lake County]

[Stamp—State of Indiana S.S. No.
—Lake County—Filed for Record—1947 Jun 2 PM 1 48—Paul P. Kozacik, Recorder]

Book 782 Page 309

[fol. 1377] as Document No. 74127, in Book No. 666, Page 278, and that certain Warranty Deed executed by the Elgin, Joliet and Eastern Railroad Company, an Illinois and Indiana corporation, dated December 22, 1942, and filed for record in the Recorder's Office of Lake County, Indiana, on December 23, 1942, as Document No. 82584, in Book 670, Page 68.

PROVIDED, that the title to the said premises shall automatically revert to the United States if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time after the date hereof, or that after having been so developed the premises have ceased to be used or are necessary for airport purposes.

Said land was duly declared surplus and assigned to the War Assets Administration for disposal acting pursuant to Executive Order 9689 and War Assets Regulation No. 1, as amended.

AND, the Grantee for and in consideration of the property conveyed hereby does for itself and its successors in function, covenant and agree as follows:

FIRST: That the Grantee will develop an airport upon the lands herein demised

SECOND: That such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination;

THIRD: That any subsequent transfer of the property interest conveyed hereby will be made subject to all of the covenants, conditions and limitations contained in this instrument.

FOURTH: That in the event of breach of any condition or covenant herein imposed, then the Administrator of Civil Aeronautics of the U.S.

Department of Commerce, or his successor in function, may immediately enter and possess himself of title to the herein demised premises for and on behalf of the United States of America;

FIFTH: That in the event of breach of any condition or covenant herein imposed, the Grantee will, upon demand by the Administrator of Civil Aeronautics of the U.S. Department of Commerce, take such action, including the prose- [fol. 1378] cution of suit, or execute such instruments, as may be necessary and required to evidence transfer of title to the herein demised premises to the United States of America.

IN WITNESS WHEREOF, the UNITED STATES OF AMERICA has caused these presents to be executed in its name by the War Assets Administrator this 29th day of May, 1947.

RECONSTRUCTION FINANCE CORPORATION
By and through the
WAR ASSETS ADMINISTRATOR

By /s/ JOSEPH A. BURKE
Joseph A. Burke
Zone Director, Zone III
Office of Real Property Disposal
War Assets Administration
Chicago, Illinois

Witnesses:

/s/ JOHN J. LAWLESS
John J. Lawless

/s/ SAMUEL S. DUBIN
Samuel S. Dubin

[fol. 1379]

STATE OF INDIANA,
COUNTY OF LAKE, SS.:

This is to certify that I, RAY BUTZ, recorder of Lake County, Indiana, am the custodian of the records of this office, and that the foregoing is a full, true and complete copy of a QUIT CLAIM DEED as recorded in DEED Record 782 Page 309 to 311 Inc. with the certificate of Paul P. Kozacik Recorder, at the time of filing of said instrument.

Dated this 19th day of March 1960.

/s/ RAY BUTZ
RAY BUTZ, Recorder Lake County, Ind.

(Seal)

[fol. 1380]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 3

Ordinance No. 2897

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES, AND OTHERWISE REGULATING THE USE OF PROPERTY IN THE VICINITY OF THE GARY MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH AND TURNING ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; DEFINING CERTAIN TERMS USED THEREIN; PROVIDING FOR APPEALS THEREFROM; AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

WHEREAS, airport hazards endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has, through the power granted it under the Airport Act of 1945 and amendments thereto, adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land, and

WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has by Resolution recommended the adoption of this ordinance,

NOW, THEREFORE, PURSUANT to the powers granted by virtue of Section 9, Chapter 360, of the Acts of 1945; Chapter 174 of the Acts of 1947; and Chapter 109 of [fol. 1381] the Acts of 1949, as well as its general police powers, BE IT ORDAINED by the Common Council of the City of Gary, Lake County, Indiana, as follows:

Section 1: SHORT TITLE—This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the City of Gary".

Section 2: DEFINITIONS—As used in this Ordinance, unless the context otherwise requires:

(a) "Airport" means the Gary Municipal Airport encompassing the area bounded by the Calumet River on the south, the E. J. & E. Railroad right of way on the west, and by the U. S. Highway No. 12 on the north and east.

(b) "Airport hazard" means any structure or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft.

(c) "Non-conforming use" means any structure or use of land which does not conform to a regulation prescribed

in this ordinance or any amendment thereto as of the effective date of such regulations.

(d) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic and includes any trustee, receiver, assignee or other similar representative thereof.

(e) "Structure" means any object constructed or installed by man, including but without limitation buildings, towers, smoke stacks, and overhead transmission lines.

(f) "Landing area" means the area of the Airport used for the decend, landing, taking off or taxiing of aircraft.

Section 3. Zones—In order to carry out the purposes of this ordinance, all the land within the boundaries of the Gary Municipal Airport and within two miles of the end of any proposed runway is hereby divided into:

[fol. 1382] (a) Turning Zones

(b) Outer Area Approach Zones

(c) Inner Area Approach Zones

(d) Transition Zones

the boundaries of which are shown on the Gary Airport Zoning Map dated April 12, 1949, and which is made a part hereof and incorporated herein by reference, two copies of which Map are on file in the office of the City Clerk and in the Office of the City Engineer, said Map shall be available for examination at all times that said respective Offices shall be open for business. There is hereby incorporated herein by reference and made a part hereof a Lay-Out Plan or Map, dated April 12, 1949, to be used in connection with the Gary Airport Zoning Map, two copies of which said Lay-Out Plan are on file in both the offices of the City Clerk and City Engineer, and which said Maps shall likewise be available for examination.

Section 4: Height Limits—Except as otherwise provided in this ordinance, no structure shall be erected, altered, or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit

herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

[fol. 1383] All height limits shall begin at elevation of 590 feet above sea level.

Section 5: Non-Conforming Use—The regulations prescribed in Section 4, of this Ordinance, shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted and completed within two years thereof.

Section 6: Variances—Any person desiring to erect any structure or increase the height of any structure or use his property not in accordance with the regulations prescribed in this Ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance. All variances hereunder shall be granted by the Board of Zoning Appeals of the City of Gary as hereinafter constituted and all requests therefor shall be in accordance and under the rules and regulations of the

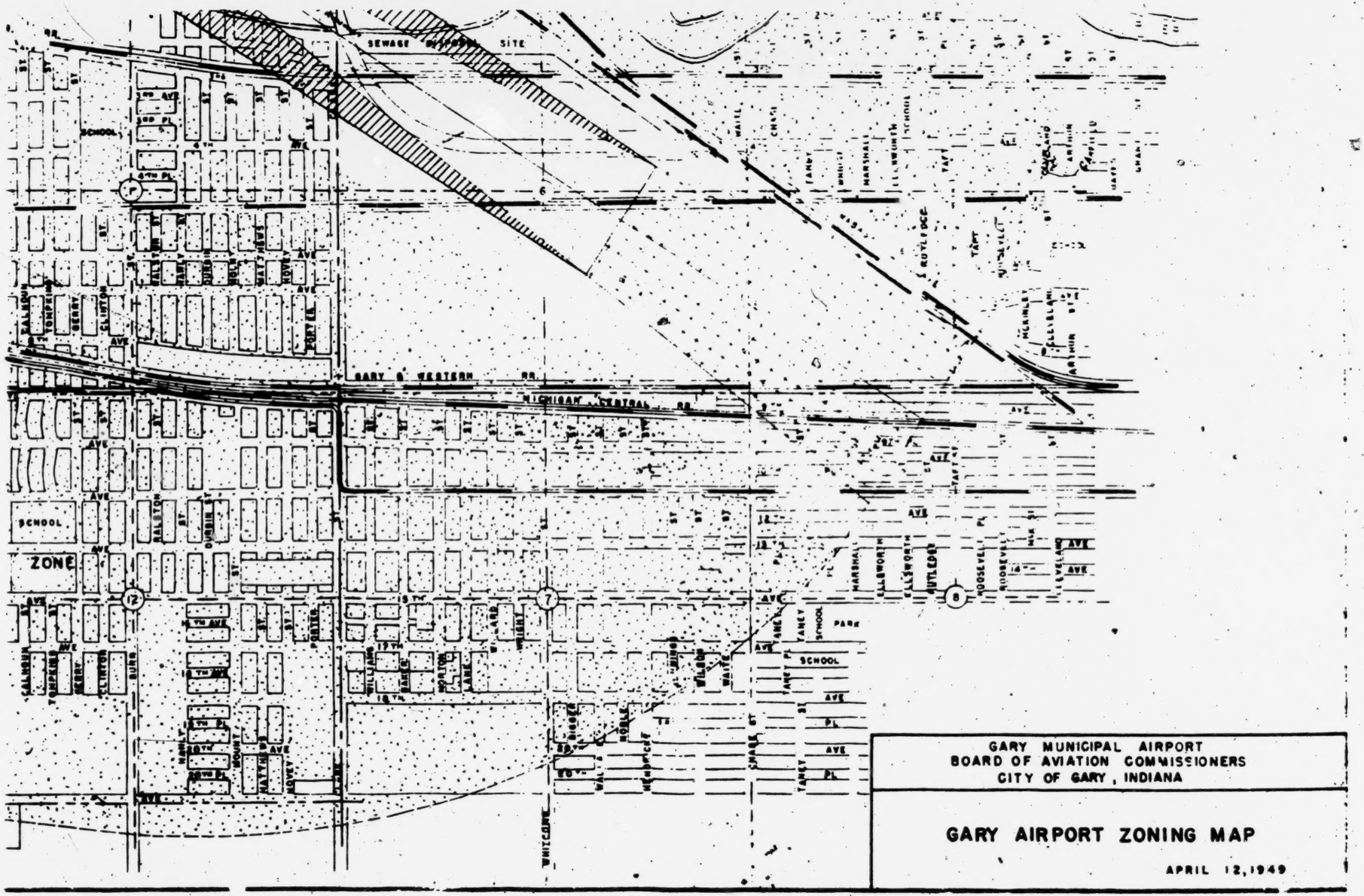
Board of Zoning Appeals of the City of Gary, and all laws now in effect in respect thereto.

Section 7: APPEALS—(a) The Board of Zoning Appeals of the City of Gary shall be and is hereby constituted the proper Board to which all appeals from decisions rendered in the enforcement of this ordinance or any other zoning ordinance shall be taken. All such appeals from the decision or ruling of any board, agency or department of the City of Gary in respect to such zoning ordinances shall follow the rules of the said Board of Zoning Appeals, and [fol. 1384] all statutes of the State of Indiana in such case made and provided.

(b) Whenever notice of any such appeal shall be served upon any such board, agency or department of the City of Gary, it shall be the duty of the secretary, chairman or department head of any such board, agency or department to immediately notify in writing the Secretary of the Board of Aviation Commissioners of such appeal. The said Board of Aviation Commissioners shall have the power to intervene in such proceedings and be heard insofar as such ruling or decision may affect the operation of said Municipal Airport.

(c) No department, board or agency of the City shall have the power to grant variances hereunder except such Board of Zoning Appeals, and nothing contained herein shall prevent the Board of Aviation Commissioners from appealing such decision or ruling to the Board of Zoning Appeals, or prevent said Board of Aviation Commissioners from appealing any decision, grant or ruling of said Board of Zoning Appeals to a proper court as now provided by law.

(d) Whenever any petition or application shall be filed with the Board of Zoning Appeals for any variance under this ordinance or any other zoning ordinance affecting said Airport, the said Board of Zoning Appeals shall immediately notify the Secretary of the Board of Aviation Commissioners of such application or petition and the said Board of Aviation Commissioners shall be granted an opportunity to be heard in respect thereto.


SEWAGE DISPOSAL SITE
GARY & WESTERN RR.
MICHIGAN CENTRAL RR.
SCHOOL
ZONE
PARK
GARY MUNICIPAL AIRPORT
BOARD OF AVIATION COMMISSIONERS
CITY OF GARY, INDIANA
GARY AIRPORT ZONING MAP
APRIL 12, 1949

(e) An appeal from the decision of any such Board, agency or department of the City of Gary to the Board of Zoning Appeals shall stay all proceedings of the action appealed from unless the aggrieved person or the Board of Aviation Commissioners certifies to the Board of Zoning Appeals after notice of appeal has been filed with it, that by reason of the facts stated in the certificate, a stay would [fol: 1385] in his or its opinion cause unusual peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board of Zoning Appeals on notice to the Board of Aviation Commissioners on due cause shown.

(f) The Board of Zoning Appeals shall have the same power as is now granted unto it by law in relation to other zoning matters.

Section 8: Whenever and wherever enforcement of this ordinance necessarily involves property or real estate situated within the boundaries of another municipality, the Board of Zoning Appeals is hereby granted authority to act, if in conformance with the ordinances, rules, or regulations of such adjoining municipality, or may act jointly with a Board of Zoning Appeals of any other municipality, if such provisions shall be made by such municipality, it being the intention hereof to permit said Board of Zoning Appeals to cooperate and coordinate in its efforts with any other agency or board of any adjoining municipality towards enforcement in fact and in spirit of the purposes and intent of this ordinance.

Section 9: The construction, erection or maintenance of any airport hazard in violation of this ordinance is hereby declared to be a public nuisance.

Section 10: PENALTIES—Each violation of this Ordinance or any regulation, order, or ruling promulgated hereunder, shall be punishable by a fine or not more than $300.00 and each day a violation continues shall be a separate offense.

Section 11: CONFLICTING REGULATIONS—Where this ordinance imposes a greater or more stringent restriction

upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this Ordinance shall govern.

Section 12: SEVERABILITY—If any of the provisions of the ordinance or the application thereof to any person or [fol. 1386] circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 13: This ordinance shall be in full force and effect from and after its passage.

Passed by the Common Council of the City of Gary, Lake County, Indiana, this 19th day of Sept., 1949.

HOBART D. WIGGERLY
Presiding Officer

ATTEST: NICK P. ELICH
City Clerk

Presented by me to the Mayor for his approval and signature, this 20th day of Sept., 1949.

NICK P. ELICH
City Clerk

Approved and signed by me this 20th day of Sept., 1949.

EUGENE H. SWARTZ
Mayor, City of Gary, Indiana

[fol. 1387]

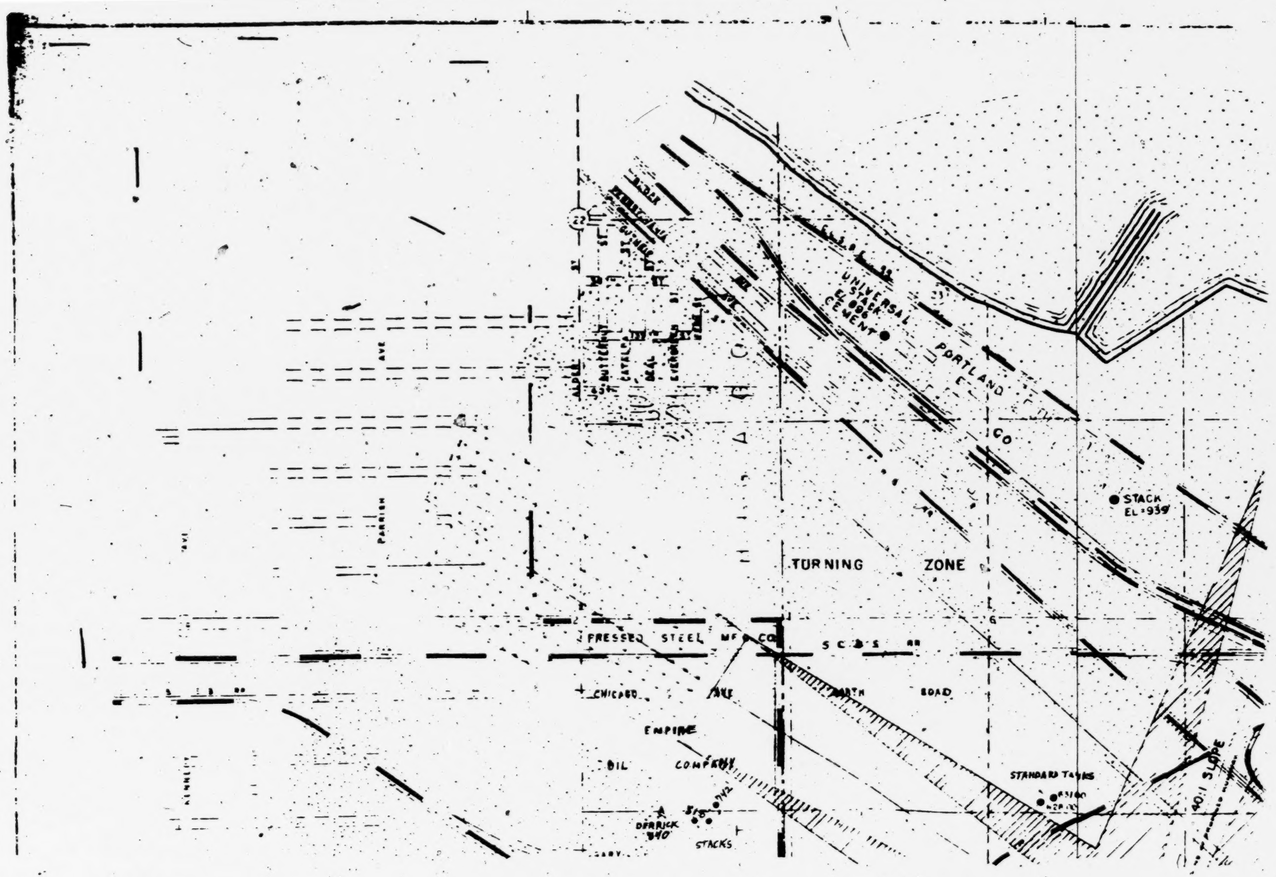
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

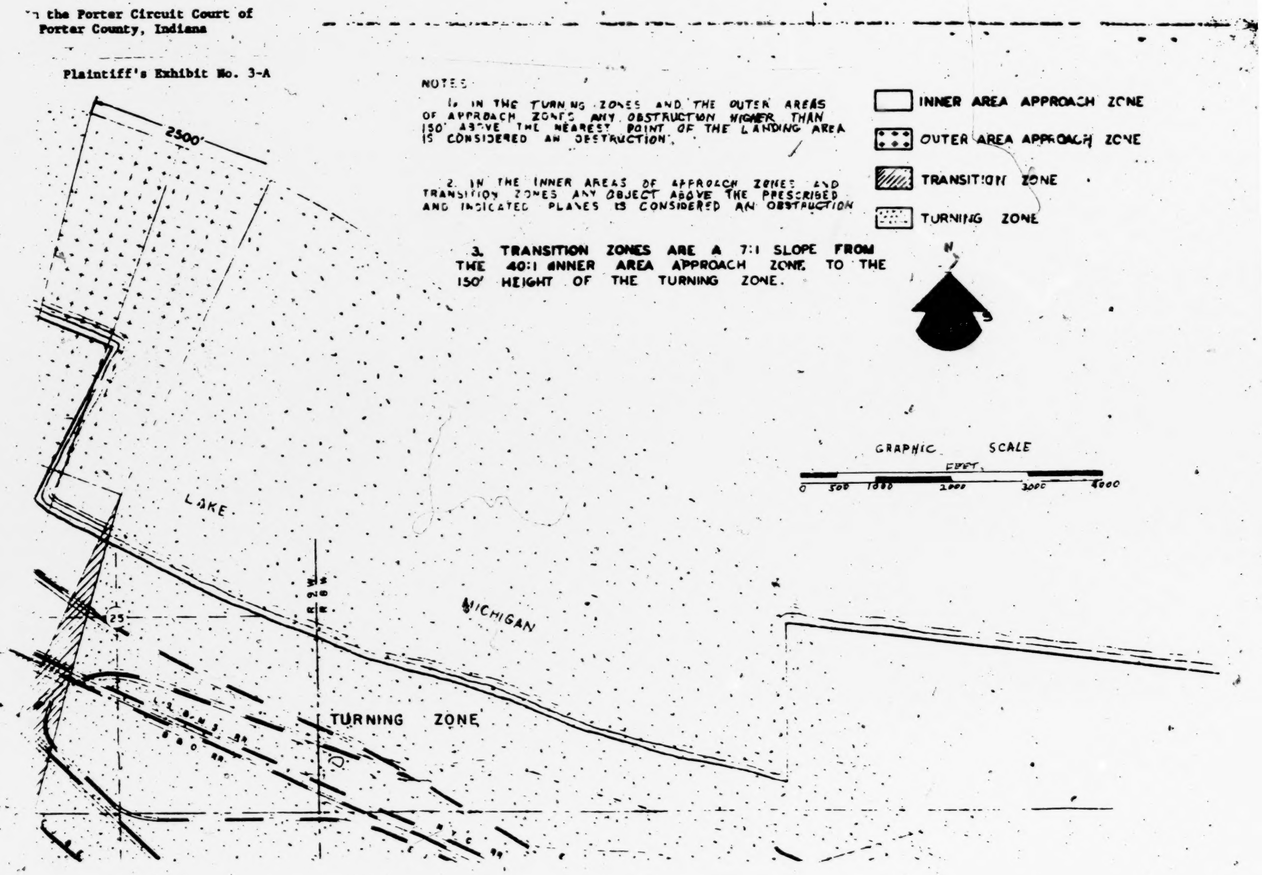
PLAINTIFFS' EXHIBIT No. 3A

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 3-A





NOTES:

1. IN THE TURNING ZONES AND THE OUTER AREAS OF APPROACH ZONES ANY OBSTRUCTION HIGHER THAN 150' ABOVE THE NEAREST POINT OF THE LANDING AREA IS CONSIDERED AN OBSTRUCTION.

2. IN THE INNER AREAS OF APPROACH ZONES AND TRANSITION ZONES ANY OBJECT ABOVE THE PRESCRIBED AND INDICATED PLANES IS CONSIDERED AN OBSTRUCTION.

3. TRANSITION ZONES ARE A 7:1 SLOPE FROM THE 40:1 INNER AREA APPROACH ZONE TO THE 150' HEIGHT OF THE TURNING ZONE.

INNER AREA APPROACH ZONE

OUTER AREA APPROACH ZONE

TRANSITION ZONE

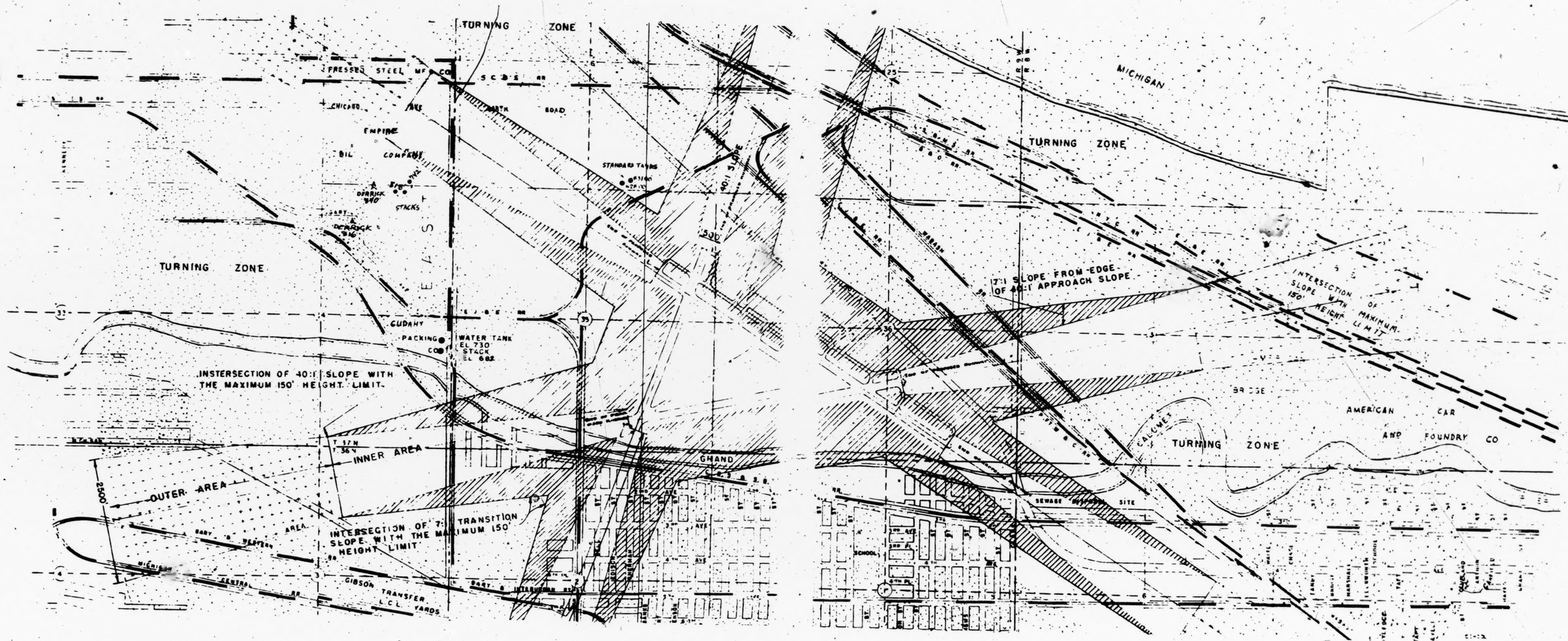
TURNING ZONE

N

GRAPHIC SCALE

FEET

0 500 1000 2000 3000 4000



In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 3-B

133 971 ACRES

INDUSTRIAL HIGHWAY U.S. NO 12

BM 82

-1+50

NW-SE RW

R 1071 28'

S 89°-59'-52" E 250

N 0°-0'-08" E 1236 18'

N 88°-54'-17" W 22 935'

S 88°-54'-17" E 1294 195'

1455'

2622 18'

3863'

BM 83

BM 84

BM 85

BM 86

N-S RUNWAY 150' x 3900'

N 2°-41'-30" E

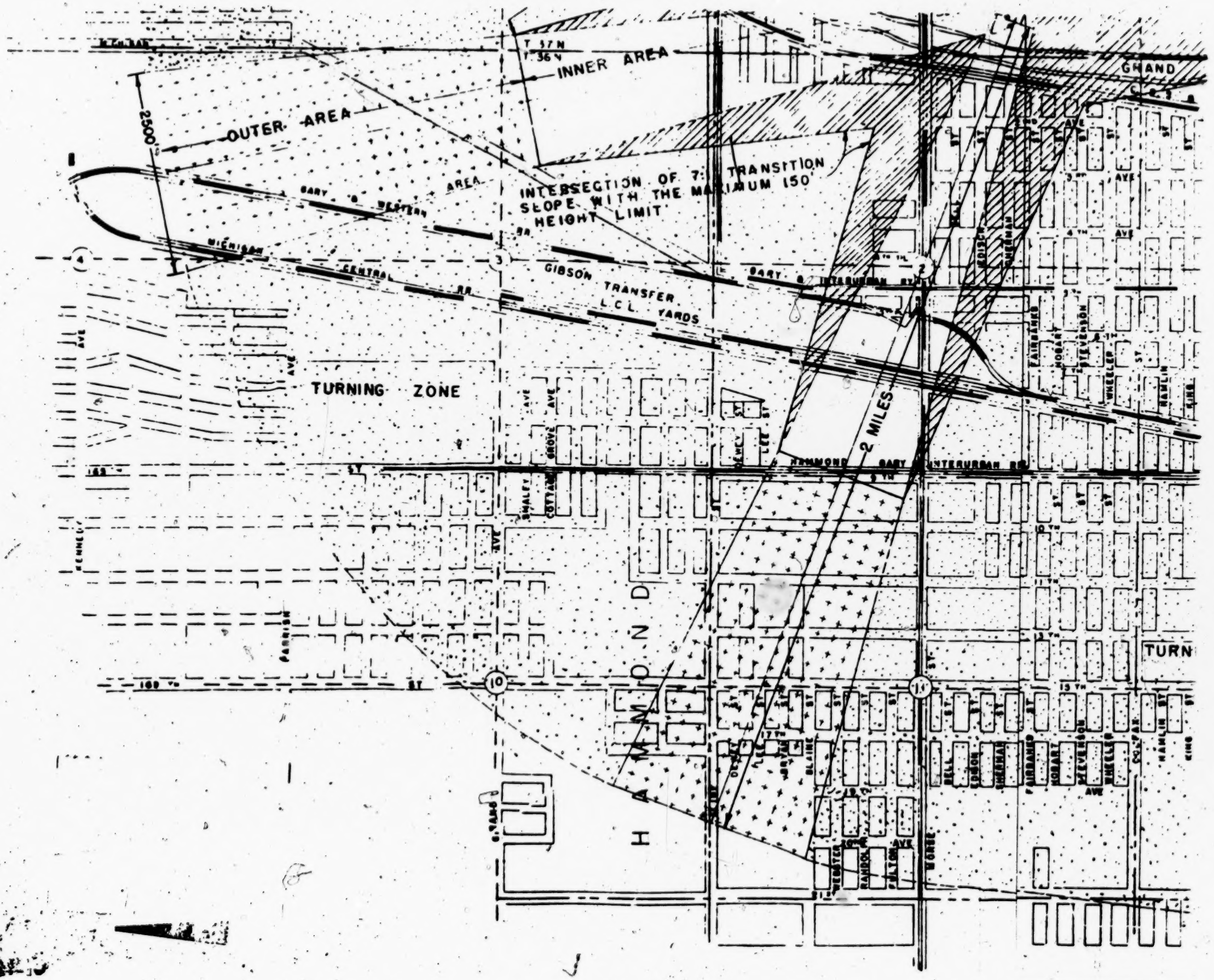
N 43°-20'-00" E

N 5°-58'-30" W

W-SE RUNWAY 150' x 4800'

APRON

471 654 ACRES


INNER AREA
OUTER AREA
2500'
INTERSECTION OF 7: TRANSITION SLOPE WITH THE MAXIMUM 150' HEIGHT LIMIT
GIBSON TRANSFER L.C.L. YARDS
TURNING ZONE
2 MILES
GRAND
HAMMOND
TURN

HIGHWAY U.S. NO. 12

APRON

NW-SE RUNWAY

N 54° 58' 30" W

RM #6

50' X 4800'

S 46° 33' 52" E

N 89° 50' 30" W

317.16'

6	589 31	TOP
9	585 39	TOP
22	587 57	TOP
23	590 35	TOP
25	591 93	TOP
27	585 73	TOP
28	584 40	TOP

9	583 89	TOP OF CONCRETE MONUMENT 2' R OF E W RUNWAY AT STA 13+26
22	587 97	TOP OF 1/2" IRON PIPE 100' S E OF STA 72+00 NW-SE RUNWAY.
23	590 35	TOP OF 1/2" IRON PIPE 300' RT OF STA 65+50 NW-SE RUNWAY.
25	591 93	TOP OF 1/2" IRON PIPE 728.8' RT OF STA 55+20 NW-SE RUNWAY.
27	585 73	TOP OF 1/2" IRON PIPE 555.4' RT. OF STA 31+74 E-W RUNWAY
28	584 40	TOP OF 1/2" IRON PIPE 450' RT OF STA 23+13 E-W RUNWAY

ST. ELGIN, JOLIET & EASTERN R.R.

CORNER TO CORNER 2022.18'
N 0°-12'-26" E 2230.63'

471.654 ACRES

N-S RUNWAY 150' X
N 21°-01'-30" E.

E-W RUNWAY 150' X 4700'
S 79°-01'-30" W.

BM #26
30' X 4800

BM #27

BM #28

BM #29

N 66°-51 W 307.5'

N 71°-33 W 80.12'

N 75°-10 W 149.73'

THREAD OF STREAM

LOW WATER LINE

GOVT MEANDER LINE

4.121 ACRES
(SD OF THREAD OF STREAM)

1088.61

1572.88
N 88°-16 W

SECTION LINE

2108.99

2661.49

N 82°-12 W

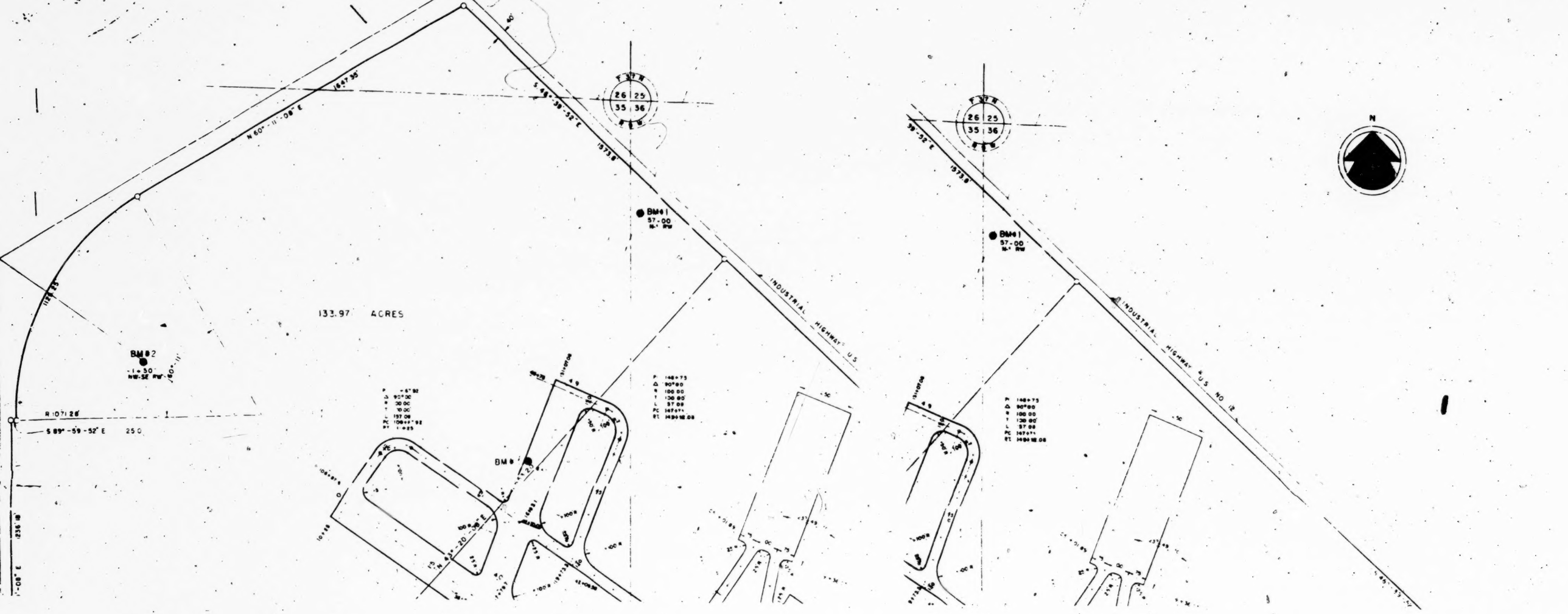
GRAND
N 85°-53 W

N 1°-05 E
1627.91

CALUMET
S 88°-01 W

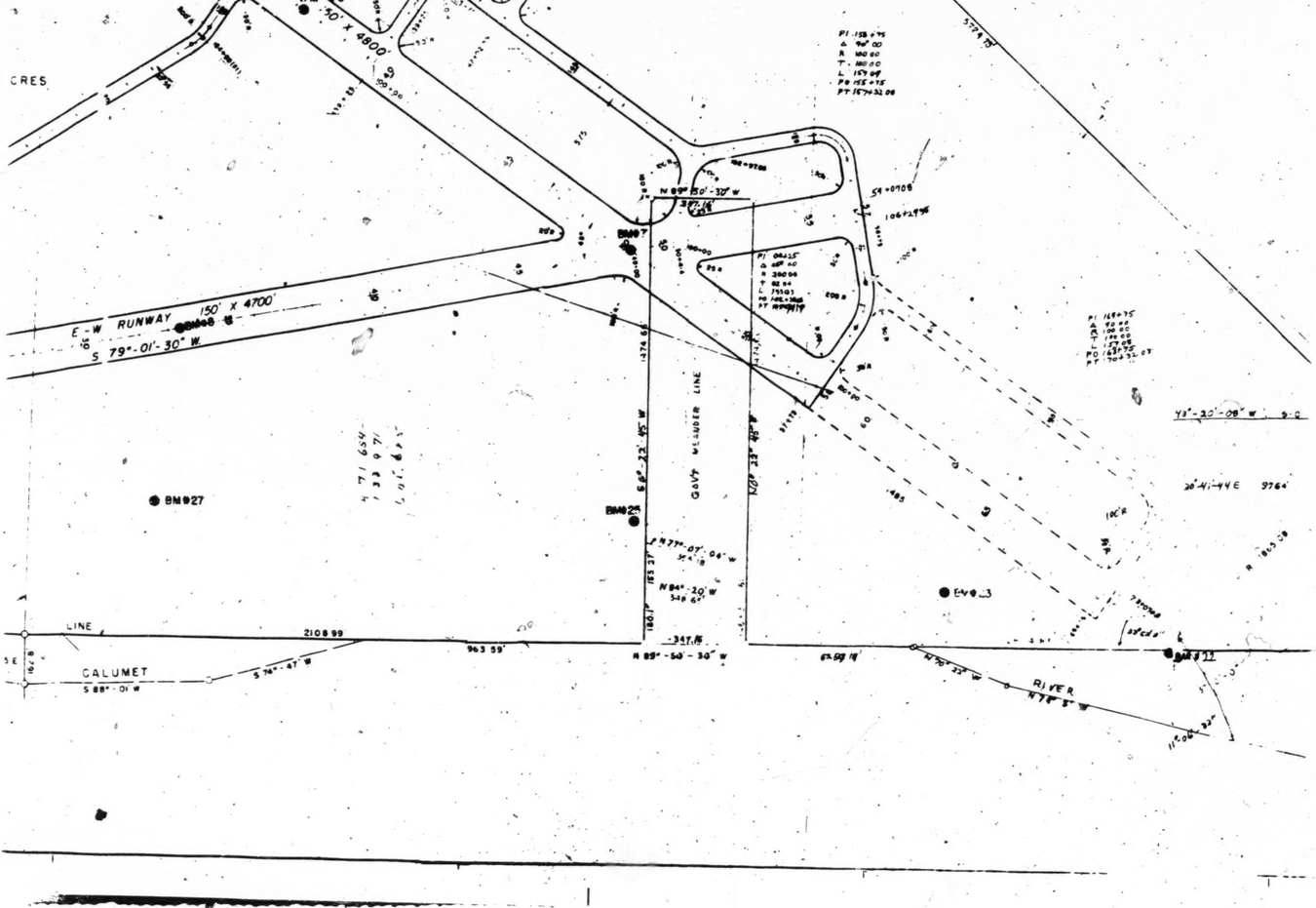
S 74°-47 W

471.654


133.97 ACRES
INDUSTRIAL HIGHWAY - U.S. NO 12
BM # 1
57-00
BM # 2
BM # 3
N 60° - 11' - 08" E 1647.35
S 49° - 38' - 52" E 1573.8
S 89° - 59' - 52" E 250
R 1071.28
N
26 25
35 36

BENCH MARKS

NO	ELEV	DESCRIPTION
US CG	596.686	U.S. COAST & GEODETIC BRONZE PLATE SET IN SOUTH FACE OF NORTH PIER OF E.J.&E. RR BRIDGE OVER PENN. R.R. TRACKS.
1	590.27	TOP OF 1/2" IRON PIPE AT STA. 57+00 N-S RUNWAY.
2	589.35	TOP OF 1/2" IRON PIPE AT STA. -1+50 NW-SE RUNWAY.
3	590.79	TOP OF CONCRETE MONUMENT 57.6' WEST OF STA. 45+36 ON N-S RUNWAY
4	591.44	TOP OF 1/2" IRON PIPE AT INTERSECTION OF N-S & NW-SE RUNWAYS
5	589.66	TOP OF 1/2" IRON PIPE AT STA. 29+00 N-S RUNWAY.
6	591.11	TOP OF 1/2" IRON PIPE AT STA. 36+30 NW-SE RUNWAY.
7	589.39	TOP OF 1/2" IRON PIPE AT INTERSECTION OF NW-SE & E-W RUNWAYS
8	589.31	TOP OF 1/2" IRON PIPE AT STA. 32+44 ON E-W RUNWAY
9	585.59	TOP OF CONCRETE MONUMENT 2' R OF E-W RUNWAY AT STA. 13+26
22	587.97	TOP OF 1/2" IRON PIPE 100' S.E. OF STA. 72+00 NW-SE RUNWAY.
23	590.35	TOP OF 1/2" IRON PIPE 300' RT OF STA. 65+50 NW-SE RUNWAY.
25	591.93	TOP OF 1/2" IRON PIPE 728.8' RT OF STA. 55+20 NW-SE RUNWAY.
27	585.73	TOP OF 1/2" IRON PIPE 555.4' RT OF STA. 31+74 E-W RUNWAY.
28	584.40	TOP OF 1/2" IRON PIPE 450' RT OF STA. 23+13 E-W RUNWAY.



COMPOSITE WIND ROSE

COMPILED FROM VARIOUS AVAILABLE SOURCES

SCALE

0 50 100 200 300 400 500 600 700 800

GARY MUNICIPAL AIRPORT
BOARD OF AVIATION COMMISSIONERS
CITY OF GARY, INDIANA

LAYOUT PLAN

BEINE, HALL AND CURRAN ARCHITECTS AND ENGINEERS
GARY, INDIANA

APPROVED

APPROVED CHIEF AIRPORT ENGINEER

DATE DRAWN BY BLA CHECKED BY

REVISED SHEET G-09

[fol. 1389]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 4

Book 553 Page 378

STANDARD FIXED BASE OPERATORS GROUND LEASE AGREEMENT

THIS AGREEMENT, Made and entered into in duplicate this 23rd day of March, 1950, by and between the CITY OF GARY, a municipal corporation of Lake County, Indiana, acting as by law provided and through its BOARD OF AVIATION COMMISSIONERS, as Lessor herein, and Nick Jankovich and Paul Jankovich, a co-partnership doing business as the CALUMET AVIATION COMPANY, having its principal office and place of business in Lake County, Indiana, and referred to as Lessees herein.

WITNESSETH:

WHEREAS, the Lessor herein is the owner of the Gary Municipal Airport located in that part of the East ½ Sec. 35, Twp. 37, Range 9 West of the 2nd P.M. lying between CLS & E Railroad and Grand Calumet River, and that part of the West ½ Sec. 36, Twp. 37, Range 9 West, lying between U. S. Highway 12 and Grand Calumet River, and that part of SE¼ Sec. 36, Twp. 37, Range 9 West, lying between U. S. Highway 12 and Grand Calumet River, and that part of the SE¼, Sec. 26, Twp. 37, Range 9 West, lying between the CLS & E Railroad and U. S. Highway 12, containing 610 acres, more or less, (commonly known as the Gary Municipal Airport site) all in the City of Gary, Lake County, Indiana, and

WHEREAS, the Lessor desires to grant and lease unto the Lessees certain parcels of lands located upon said airport, together with certain privileges, rights, uses and interests therein, exclusive or otherwise, as hereinafter set out, and

WHEREAS, the Lessees desire to obtain and avail themselves of the said privileges, rights, uses and interests therein from the said City of Gary, acting as aforesaid, and all as hereinafter set forth, NOW THEREFORE:

Book 553 Page 379

[fol. 1390]

ARTICLE I

1. DESCRIPTION OF PREMISES DEMISED
2. PRIVILEGES, USES, RIGHTS AND INTERESTS DESCRIBED
3. DEFINITION OF FIXED BASE OPERATOR

1. The Lessor, in consideration of the compensations and the sundry covenants and agreements set forth herein to be kept and performed by the Lessees, does hereby and by these presents demise and lease unto the Lessees conditionally, as hereinafter set forth, all of which the Lessees accept conditionally, as aforesaid, the following premises, and attendant privileges, uses, rights and interests hereinafter described, to-wit: plot A in aviation commercial lease plot area, location of which is set forth in Exhibit I, stipulated and agreed between the parties to be correct, designated as Plat No. 1 and by reference made a part hereof, together with the general use of all functional facilities and improvements of a public nature which are now or may hereafter be connected with or appurtenant to said airport, except as hereinafter provided, to be used by Lessees as a fixed base operation as herein defined and for no other purpose.

(a) It is stipulated and agreed between the parties that a complete plat of the entire airport, containing the correct designations of all areas thereon, together with the uses to which said areas may be subjected, shall be attached to this lease and by reference made a part hereof, and it is specifically stipulated and agreed that after the execution hereof, no alteration of said plat or change of said uses shall be made without the specific consent of the Lessees herein.

(b) Specifically, it is understood and agreed that Zone T shall at all times be considered by the parties hereto as being an area of general and public functional use, open to these Lessees, and any other airport Lessee, and it shall be maintained free and clear of limited, restricted or exclusive non-scheduled aviation commercial operations; pro-

[fol. 1391] vided, that any Lessee of any plot or parcel of land containing 15,000 sq. ft. or more within the areas designated as aviation commercial lease plots as set forth in Exhibit I, attached hereto, shall have an option, right and privilege to occupy general office space in any terminal or similar public and functional building constructed in said zone for purposes directly connected with the business operated on the premises theretofore leased, and all upon like and equal terms with each other.

(c) It is specifically stipulated and agreed between the parties hereto that the Lessees shall at all times maintain all of its aircraft in a lawful manner and conform to all of the rules and regulations of any properly constituted authority having jurisdiction over activities engaged in by the Lessees herein. This clause refers specifically to state and federal authorities.

2. In addition to the general privileges, uses, rights and interests attaching to the demised premises h einbefore described and without limiting the generality thereof, the following particular privileges, uses, rights and interests are demised to the Lessees, to-wit:

(a) The loading and unloading of airplanes owned, leased, or operated by the Lessees in any lawful activities.

(b) The servicing and maintaining of airplanes owned, leased, sold or operated by the Lessees.

(c) The maintenance and servicing of airplanes, which shall include overhauling, rebuilding, repairing, inspection and licensing of same, and the purchase and sale of parts and accessories therefor.

(d) The right to maintain a business of buying and selling airplanes, parts, and accessories therefor, aviation equipment of all descriptions, either retail or wholesale or as a dealer; tobaccos, confections and refreshments vended

[fol. 1392] by coin operated machines; and to maintain on said premises appropriate facilities for the conducting of said business.

(e) The training on the airport of personnel in the employ of the Lessees, and other persons or members of the public generally as students, or otherwise, in any art, science, craft or skill pertaining directly or indirectly to aircraft.

(f) The free and unrestricted use of airfield facilities and navigational aids and facilities relating thereto for purposes of commercial and non-commercial landings, take-offs and taxiing, except local passenger hopping for hire which hereby is specifically prohibited.

(g) Particularly and at all times set out herein, the Lessees shall have the full and unrestrieted use of and a right of ingress to and egress from the demised premises, which shall extend to its officers, agents, servants, employees, patrons, invitees, and suppliers of service; all of which shall also extend to the airplanes, vehicles and other property of said persons and the Lessees without charge therefor except the considerations set out herein, excepting however, a reasonable charge for automobile parking by patrons and invitees.

(h) The Lessees shall have the right, either personally or by contract, to provide for the location, construction, erection, maintenance, or removal of improvements, in any lawful manner, upon or in the demised premises, for the purpose of carrying out any of the activities provided for herein, subject however to the conditions herein generally or particularly set forth.

(i) The Lessor shall have all utilities brought to the limits of the demised premises, and the Lessees shall have the privilege of connection therewith without charge.

3. A fixed base operator, as herein set forth is hereby defined as an operator engaging in the sales, renting, leasing, and operation of aircraft for business, pleasure, and

[fol. 1393] industrial purposes including as related phases, the repair, overhauling, rebuilding and modification of aircraft and accessories including the instruction of pilots and the activities set forth in Article I, Section 2, Subsection (a) through (e) as an integrated operation including the selling of aircraft and the conduct of any non-scheduled type of flight operations for commercial purposes.

ARTICLE II

OPTIONS

1. The Lessees shall have an option, which shall be superior to all owners of later dated leases on said airport, which may be exercised at any time during the life of this lease, to lease the lands and parcels of lands lying in the aviation commercial lease plot area designated in Exhibit I as aviation commercial lease plots, and upon like terms and conditions as herein set out. Provided, however, that at any time before said option is taken up by the Lessees, the Lessor herein by exhibiting to the Lessees a bonafide proposal, or proposals, to lease said lands or parts or parcels thereof, together with a performance bond conditioned upon a time certain within which to execute said lease and to develop said property, shall require the Lessees to elect whether to exercise its option herein, provided further, that the Lessees shall first have a right to exercise its option upon said parcels of land upon like terms and conditions as set forth in said proposal, (or most satisfactory proposal to Lessor if more than one); provided further, that the Lessees shall have a period of twenty (20) days from the date of such notice setting forth the conditions of such pro-

posal as aforesaid within which to take up said option on like terms as aforesaid.

ARTICLE III

UNDERTAKINGS OF LESSEES WHICH ARE CONSIDERATIONS HEREIN

Book 553 Page 383

[fol. 1394] 1. Lessees agree to construct on parcel S a minimum of twenty (20) "T" hangars corresponding to minimum requirements set out herein, and any additional "T" hangars as may be required by public demand.

2. The Lessees agree to provide suitable maintenance of the taxi strips or parts thereof referred to in subsection 2 of Article V hereof.

3. The Lessees agree to maintain the lands demised, and the improvements and appurtenances thereto, in a reasonably presentable condition consistent with good business practice.

4. Lessees also agree to lay out and construct within 180 days from the execution hereof or subsequent option lease as provided for herein, in the aviation commercial lease plot area, a service hangar having a minimum of 6,000 sq. ft. of hangar space, and also such other additional improvements as may be required by public demand.

5. Lessees agree that all purchases of aviation gasoline and fuels shall be from the field bulk plant. The Lessees further agree to pay field use charges as provided for by the field bulk plant operator and also shall furnish satisfactory bond guaranteeing payment of said gasoline and fuels and field use charges.

ARTICLE IV

TERM OF LEASEHOLD

1. The term of this lease shall be for a period of twenty (20) years from the date of execution of same with an option to be exercised by Lessees for an additional ten (10)

year period; provided however, that written notice of the exercise of said option shall be served upon Lessor not less than ninety (90) days before the termination of said lease; provided, however, that where the Lessees exercised their option and enter into a lease upon other lands, parts, or parcels thereof described under the option provision

[fol. 1395] herein, the term of such lands as may be leased by virtue of said option shall likewise extend for a period of twenty (20) years from the day said option is exercised and lease executed as well as an option for an additional ten (10) years as hereinbefore set out and upon the identical conditions and provisions as herein set forth. Provided, that in the event the rights and privileges hereunder are suspended by reason of war or other national emergency, the term of this lease shall be tolled during such suspension.

ARTICLE V

RENTALS

1. In aviation commercial lease plots 125 ft. deep by 200 ft. long, base rate of $0.04 sq. ft. per year for the full net area leased.

2. In Zone S, storage area, a base rate of $0.02 sq. ft. per year for the actual ground area occupied by buildings constructed thereon. Lessor to provide usable taxi ways between T hangars, the surface of which shall support a minimum wheel load of 1500 lbs.

3. The rents herein provided for shall be paid monthly in a sum equal to 1/12 of the rents due hereunder in advance on the first day of each and every month beginning with the first day of April, 1950.

4. Provided, however, that the above set forth base rates shall increase or decrease in accordance with the increases or decreases for any calendar quarter (three months) of the averaged indices of the United States Bureau of Labor

Statistics for Hourly Wage Rates of all workers in manufacturing and of all Commodity Wholesale Prices; provided, however, that said base rates shall not be adjusted unless the computation as aforesaid shall result in a change in the base rates of $0.005 or more per sq ft. in the aviation

[fol. 1396] commercial area and $0.0025 per sq. ft. in Zone S, storage area. This clause is bilateral and can be exercised by either party.

As of date of this agreement, the U.S. B.L.S. index for Hourly Wage Rates for all manufacturing employees is $1.418, and the Commodity Wholesale Price index is 151.6. All increases or decreases shall use these indices as their base.

ARTICLE VI

TERMINATION OF LEASE, CANCELLATION, ASSIGNMENT AND TRANSFER

1. This lease shall terminate at the end of the full term thereof, and the Lessees shall have no further right, or interest in any of the lands hereby demised, except as herein provided and as may be exercised under the option provisions herein, and the Lessor shall be entitled to have the lands demised herein returned to it in the same condition in which it was originally demised and leased; except however, that the Lessees may have thirty (30) days thereafter in which to finally remove any improvements remaining upon said lands at the end of the terms provided for herein, or thereafter may be removed by Lessor at Lessees expense.

2. This lease may be terminated by the Lessees at the end of any twelve (12) month period after the execution of same; subject, however, to a ninety (90) day notice to the Lessor previous to the time when said lease is to be terminated, and Lessees shall restore the premises to its original condition within the time and as provided in Paragraph 1 of this article. This section shall also extend in like manner to any lands which may be leased by virtue of the option provided herein and under like conditions.

3. (a) In the event the Lessor for economic or other reasons shall decide to release itself from the obligation of maintaining the airport facilities, this lease shall remain in full force and effect; provided however, that the Lessees

[fol. 1397] shall have the option, either by themselves or in conjunction with other operators and/or users, to take over and maintain by themselves in a reasonable adequate manner said airport facilities as a municipal airport, or the parties may by mutual agreement determine to share the cost of said maintenance. In the event the Lessees and/or other operators or users shall elect to continue the maintenance of said airport said Lessees shall continue to pay the rentals and other payments herein proposed or any rentals and other payments provided for in other leases, but may deduct from any and all said rentals and other payments the actual cost of maintaining the facilities not otherwise required to be maintained by them under this lease; the Lessees do hereby agree that in said event, they will continue to keep all books and records in the same manner as provided herein. The cost of maintenance and payment of rents however, shall be computed on an annual basis, provided however, that in no case shall the Lessor be liable for any maintenance costs.

(b) In the event of said release of the Lessor as herein provided, and in the event that the Lessees do not elect to maintain said airport facilities, the Lessor shall pay to the Lessees as liquidated damages the depreciated value of the fixed improvements (for the purpose of this lease said depreciated value shall be computed for the term of this lease), plus a premium of 3% per year of said depreciated value for the unexpired term of this lease, and thereupon all such improvements shall be and become the sole property of Lessor; provided, however, that in lieu of said depreciated value (not including the premium), the Lessees may have the option of removing said fixed improvements and thereupon this lease shall terminate. In the event the Lessor decides to be released from the obligations as pro-

vided for in this section 3(a), such release shall not take place until one year from the date of written notice served upon Lessees or their agents, and furthermore notice of election on the part of Lessees hereunder to exercise their

[fol. 1398] option to take over and maintain the airport factilities under the terms herein provided for shall be given by the Lessees to the Lessor in writing not less than ninety (90) days prior to the expiration of the one year term stipulated above.

(c) In the event the Lessor decides to release itself from the obligation of maintaining said facilities as aforesaid, the Lessor may at any time thereafter on ninety (90) days notice in writing to Lessees, elect to again continue to obligate itself to maintain said airport and the parties shall thereafter remain in the same position under this lease as before said change in condition.

(d) The Lessor may at any time elect to abandon any and all functional facilities placed upon said airport with the exception of runways, aprons, taxi-ways, ramps, approaches, and airfield lighting facilities.

4. Default of payment of any of the rentals reserved herein to the Lessor shall give the Lessor the right to terminate said leasehold at any time after ninety (90) days notice has been given the Lessees, unless within said time the Lessees have fully complied with the rental provisions hereof; and where this leasehold is finally terminated said land shall be restored to its original condition as provided in paragraph 1 of this article. Provided further, that at any time before this leasehold has been terminated by virtue of this paragraph, the Lessees shall have the right to sell, assign and/or transfer this lease as herein otherwise provided and upon tendering to the Lessor the full amount of the rentals reserved and due.

5. The Lessor shall have the right and privilege of cancellation of this leasehold for any violation of the conditions and provisions hereof other than non-payment of

rentals reserved herein, and such cancellation may be had by application to any Circuit or Superior Court having jurisdiction over the parties and subject matter hereof, and on a trial of issues properly joined in said Court. In case a

[fol. 1399] judgment declaring cancellation of this leasehold is entered by such Circuit or Superior Court hearing said matter as herein provided, the Lessees shall have ninety (90) days after the rendering of such judgment to restore the land to its original condition, and to remove any and all of the improvements thereon during said time.

6. The Lessees shall have the right and privilege of sale, assignment and/or transfer of this leasehold outright, or in part, or as security for obligations incurred incidental to improvements upon said lands demised herein; provided, however, that outright sale, assignment and/or transfer of this leasehold including the transfer in whole or in part to other than recognized financial institutions to secure obligations incurred incidental to improvements, shall be upon notice to the Lessor stating the name and address of the proposed buyer, assignee, and/or transferee. If the Lessor shall determine that said proposed buyer, assignee, and/or transferee is objectionable, such objection shall be stated in writing to the Lessees within twenty (20) days after notice of such proposed sale, assignment, and/or transfer, and the Lessor shall have the right to procure an injunction from any Circuit or Superior Court having jurisdiction over the parties and subject matter herein, preventing such sale, assignment and/or transfer, as the case may be, upon a proper showing to the satisfaction of said Court that the proposed buyer, assignee and/or transferee is financially incompetent, or is an undesirable or bad character, or that said proposed sale, assigment, and/or transfer is in bad faith, or is not bonafide.

7. The Lessees shall have the right in any event and without regard to any other provisions herein contained, to sell, assign and/or transfer this leasehold together with all rights, privileges and interests hereunder to a corpo-

ration in which the persons now associated together as the Lessees are majority stockholders.

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[fol. 1400]

ARTICLE VII

NOTICES

1. All notices required or which may be given under the provisions of this lease shall be addressed to the respective parties herein as follows:

Board of Aviation Commissioners
City Hall
Gary, Indiana

Calumet Aviation Company
Gary Municipal Airport
Gary, Indiana

and may be sent by registered mail, or by telegram, or by personal service by handing a true copy thereof to the chairman of the Board of Aviation Commissioners or the president, secretary, or such lawfully designated agent appointed for the purpose of receiving service of process upon the Lessees.

ARTICLE VIII

GENERAL PROVISIONS

* * *

1. MINIMUM IMPROVEMENT REQUIREMENTS
2. INDEMNIFICATION
3. LIMITATION OF CONTRACTS TO OTHER LESSEES AND CONTRACTORS
4. JUDICIAL RELIEF DAMAGES
5. CONCESSIONS EXCLUDED
6. ARBITRATION

1. (a) "T" hangars shall be constructed of weather resistant metal, or equivalent, siding and roofing attached to

suitable metal, or equivalent, frame work designed to withstand a minimum of 25 lb. p.s.f. roof load and 30 lb. p.s.f. wind load. Doors shall be attached by suitable fastenings at the top thereof either to swing in under the roof or to be moved at right angles to the opening. No door wider than 4′ shall be permitted to swing outward from said hangar. A suitable foundation shall be provided with hangar posts and supports anchored thereto capable of withstanding [fol. 1401] the minimum vertical and horizontal loads above set out.

(b) Service buildings shall be constructed with approved fireproof materials. Dope rooms shall be properly partitioned off and ventilated to a degree sufficient to prevent explosions of combustible materials. Approval of the State Fire Marshal's Office shall be required on all service building layout and construction. Service office buildings shall be constructed of fireproof materials and shall not house combustible materials except in such manner as shall be approved by the State Fire Marshal's Office; outside building plans shall be approved by the Lessor and approval shall not be unreasonably withheld.

(c) Storage of fuel in "T" hangars, service buildings, or constructions attached thereto shall in nowise be provided or permitted except as may be confined to the tanks of aircraft or vehicles stored or housed within such buildings.

2. The Lessor shall stand indemnified by the Lessees as herein provided. It is expressly understood and agreed by and between the parties hereto that the Lessees herein are and shall be deemed to be an independent contractor and operator responsible to all parties for its respective acts or omissions, and the Lessor shall in no way be responsible therefor. It is further agreed that in the use of the airport and in the erection or construction of any improvements thereon, and the exercise and enjoyment of the privileges herein granted, the Lessees agree to indemnify and save

harmless the Lessor from any and all losses that may proximately result to the Lessor from any negligence on the part of the Lessees. The Lessees hereby agree to carry public liability insurance in a minimum sum of $50,000 for one person and $100,000 for two or more persons and in addition thereto to carry a minimum of $100,000 insurance for property damage liability. All of said insurance shall be carried in a company satisfactory to the Lessor. It is understood and agreed that the Lessor will be notified by the

[fol. 1402] insurance company in the event of any renewals or cancellations of said policy and the following clause shall be inserted in said insurance policy: "It is understood and agreed that the Board of Aviation Commissioners of the City of Gary, Indiana, will be notified in the event of any renewal or cancellation of this policy."

3. (a) It is expressly contracted, stipulated, and agreed by the Lessor and the Lessees herein that no contract, lease, or other agreement pertaining to matters and things identical or substantially similar to those set out herein shall be entered into with any other person, persons, firms, corporations, or partnerships, with respect to the Gary Municipal Airport which are more advantageous, or upon conditions less stringent, or at a less rental for comparable lands or parcels thereof to those herein demised, except upon the written consent and authority of the Lessees herein.

(b) The Lessor agrees not to engage directly or indirectly in any of the activities herein described or contemplated. Provided, however, that the Lessor may lease or rent land or hangars for scheduled aviation operations and for non-commercial aviation purposes for or in industrial operations.

4. It is expressly stipulated and agreed between the parties hereto that either party shall have an action for damages to be determined by any Circuit or Superior Court having jurisdiction of the persons and subject matter

herein, for breach of any condition or provision herein contained resulting in such damage.

5. It is specifically agreed and stipulated that the following concessions and the establishment thereof are excluded from this contract and lease, to-wit:

1. Ground transportation for hire
2. Western Union
3. Auto rental service
4. Food sales
5. News and sundry sales
6. Advertising concessions
7. Barber, valet and personal services
8. Retail sale of non-aviation products
9. Gasoline and fuels to transient aircraft
10. Passenger hopping for hire (Pleasure flights)
11. Sales of scheduled airline tickets after operation of terminal building

[fol. 1403] Book 553 Page 392

6. It is stipulated and agreed that, in any event and notwithstanding any provisions made in this lease, the parties hereto by mutual agreement may submit to arbitration any question and dispute, except non-payment of rentals arising between the parties hereto as to the meaning and interpretation of any term, condition, or provisions here contained or in respect to any matter of compliance or noncompliance with the terms hereof; said question or dispute shall be submitted to two arbitrators. The Lessor and the Lessees shall each select one and the two so chosen shall then select a competent and disinterested person to serve as a third arbitrator; the arbitrators together shall then consider the question or questions, or the dispute or disputes submitted to them in writing by the parties hereto, and the decision in writing of any two shall determine the

particular question or dispute under consideration. The parties hereto shall bear equally the expense of said arbitration.

ARTICLE IX

INVALID PROVISIONS

1. It is further expressly understood and agreed by and between the parties hereto that in the event any covenant, condition or provision herein contained is held to be invalid by any Court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way effect any other covenant, condition or provision herein contained, unless and provided further, that if the invalidity of any such covenant, condition or provision does materially prejudice either the Lessor or the Lessees in their respective rights and obligations contained in the valid covenants, conditions or provisions in this lease, then the entire lease shall stand void at the option of either party.

[fol. 1404] Book 553 Page 393

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

CITY OF GARY

/s/ C. W. BADER
C. W. Bader

/s/ CARL K. SHAFER
Carl K. Shafer

/s/ H. R. SACKETT
H. R. Sackett

MEMBERS OF THE
BOARD OF AVIATION COMMISSIONERS

LESSOR

ATTEST:

/s/ Louis D. Kuss
Secretary
Louis D. Kuss

NICK JANKOVICH and PAUL JANKOVICH
D/B/A CALUMET AVIATION COMPANY

/s/ NICK JANKOVICH
Nick Jankovich

/s/ PAUL JANKOVICH
Paul Jankovich

LESSEES

[Stamp—State of Indiana S.S. No.
Lake County—Filed for Record—1951 Sep 11 PM 2 15—
Book 553 Page 377—Louis Opachan, Recorder]

In the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 12

[fol. 1405]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 12

[fol. 1406]

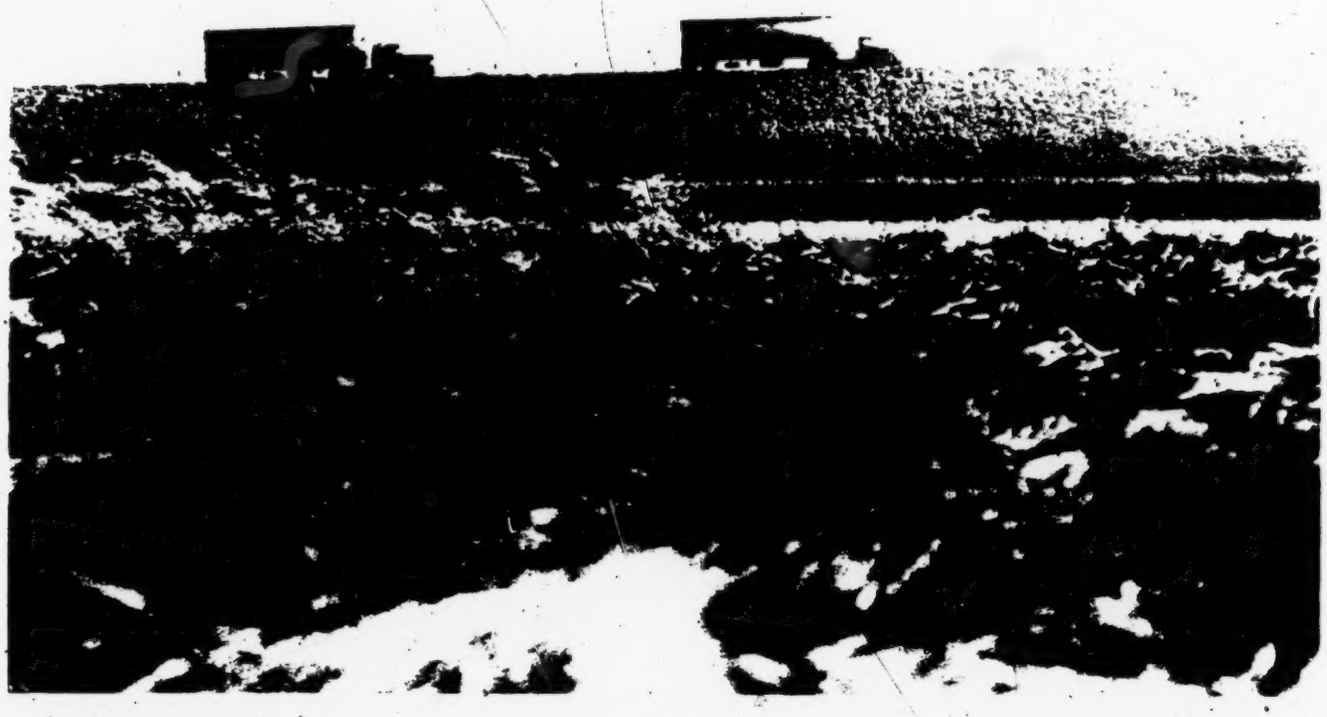
IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 13

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 13



In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 15

[fol. 1407]

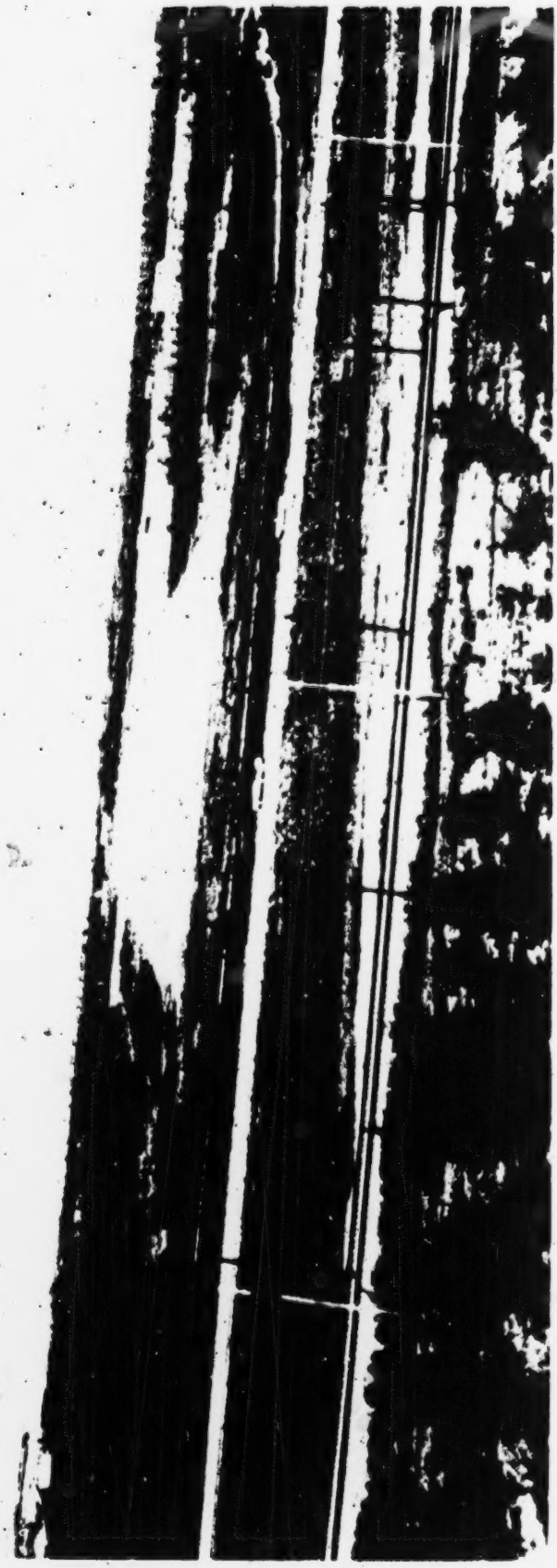
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 14

(See Opposite) ☞

the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 14

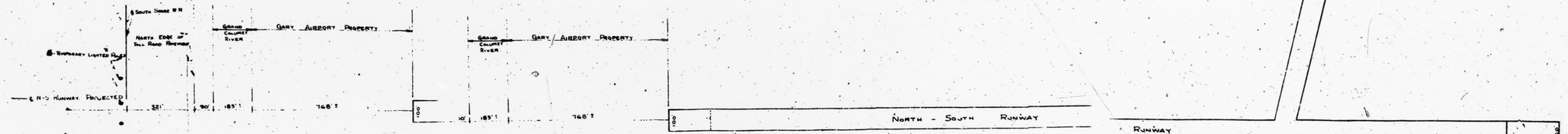


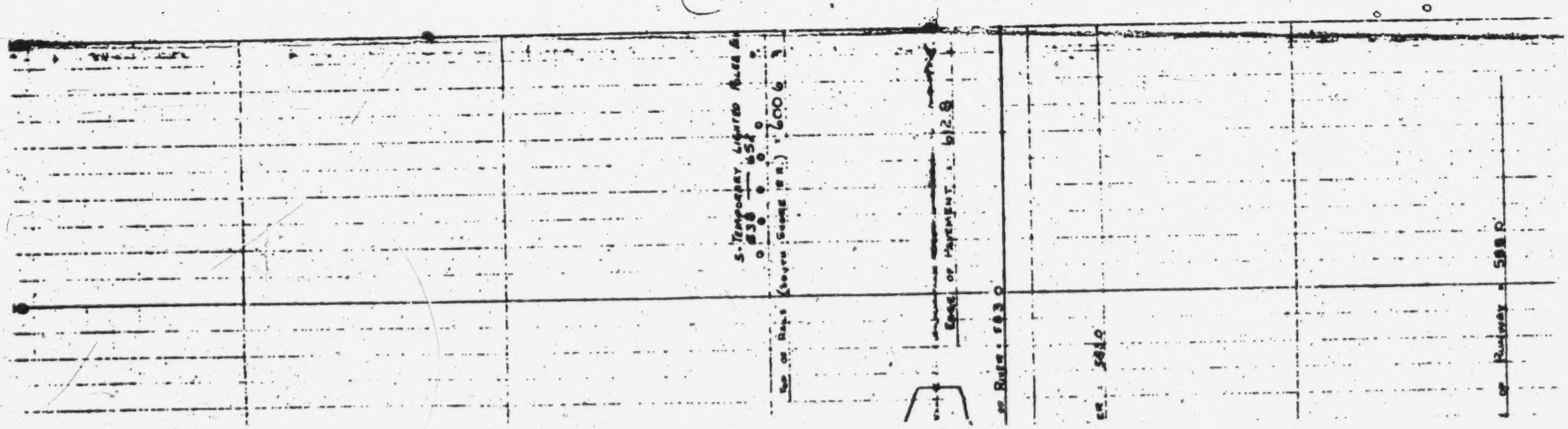
[fol. 1408]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 15

(See Opposite) ☞


℄ South Shore R R
North Edge of Tall Road Pavement
Temporary Lighted Flag
℄ N-S Runway Projected
Grand Calumet River
Gary Airport Property
Grand Calumet River
Gary Airport Property
North - South Runway
Runway

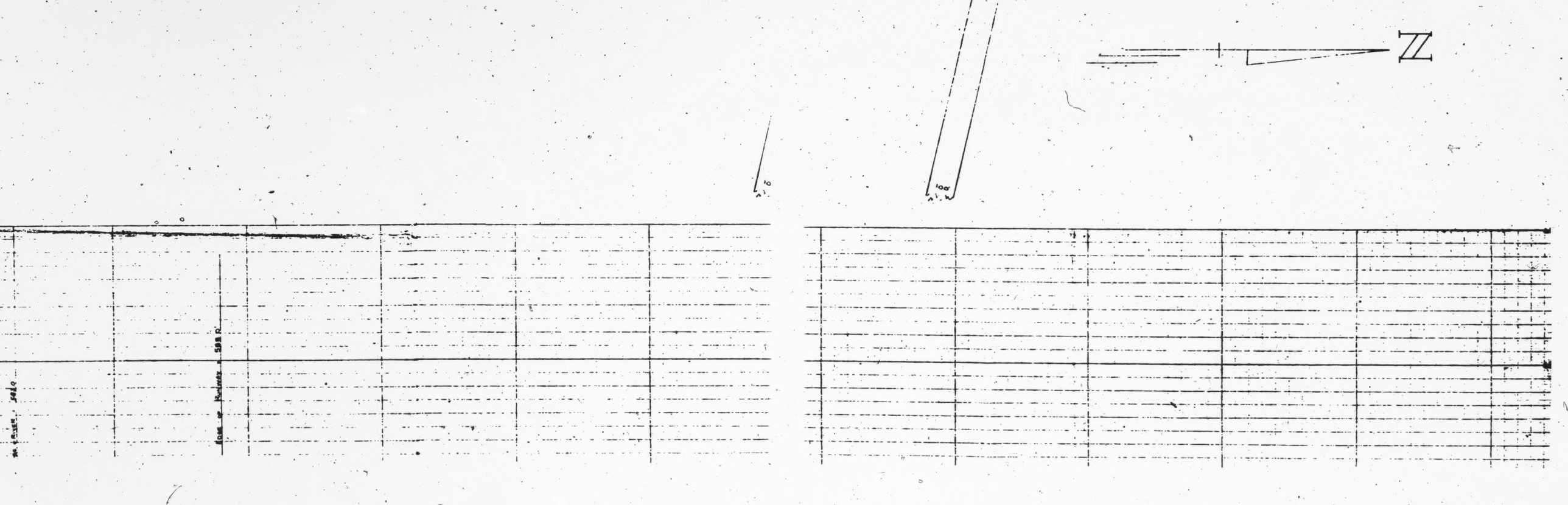


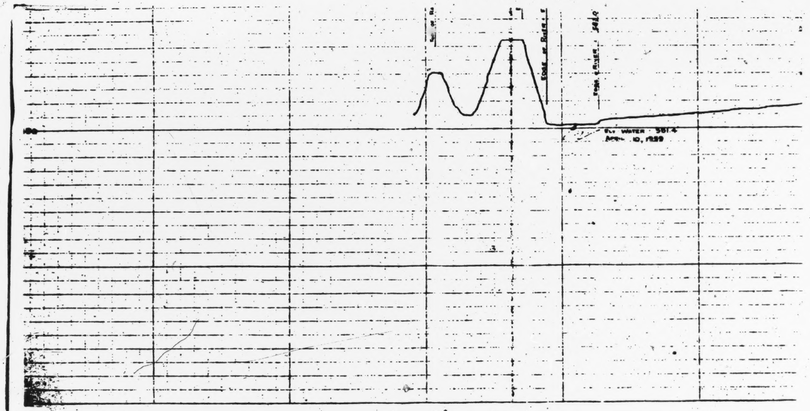
186

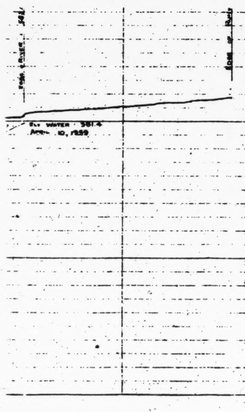
[fol. 1409]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. A



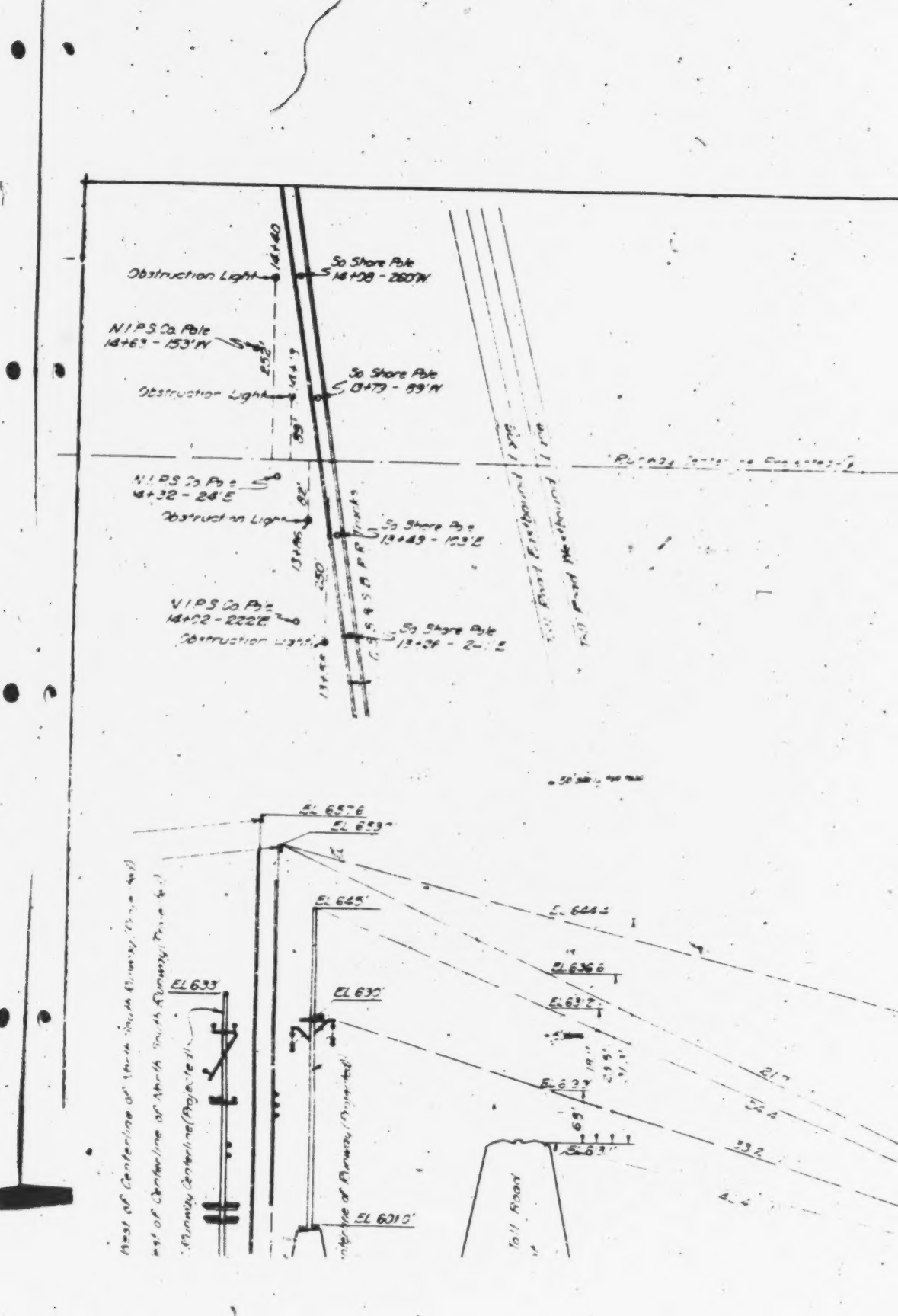




3-27-60

Rowland A. Fabian

1408

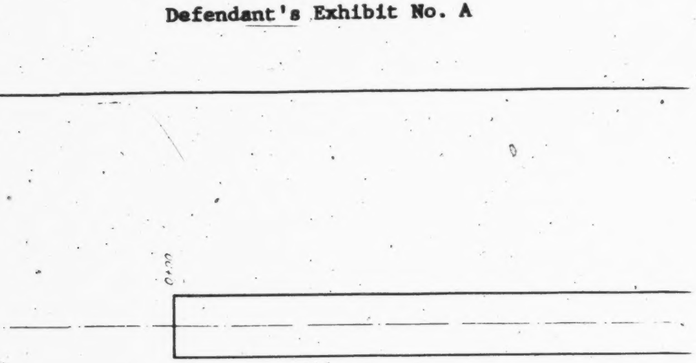

Obstruction Light
14+40
So Shore Pole
14+28 - 260'N
N.I.P.S. Co. Pole
14+63 - 153'N
252'
Obstruction Light
So Shore Pole
13+79 - 99'N
89'
N.I.P.S. Co. Pole
14+32 - 24'E
82'
Obstruction Light
So Shore Pole
13+49 - 103'E
250'
N.I.P.S. Co. Pole
14+02 - 222'E
Obstruction Light
So Shore Pole
EL 657.6
EL 653'
EL 645'
EL 644.2
EL 636.6
EL 633'
EL 630'
EL 627.4
EL 601.0'
Toll Road

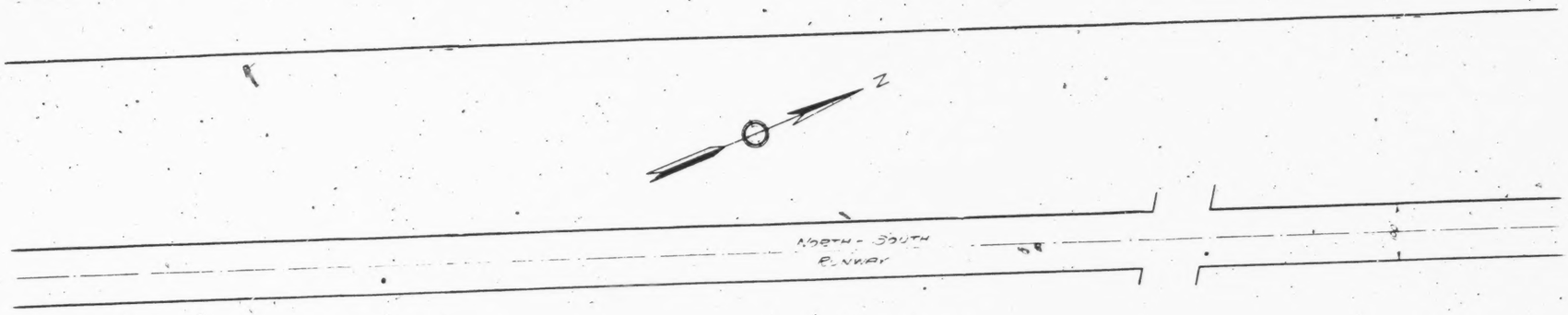
In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. A

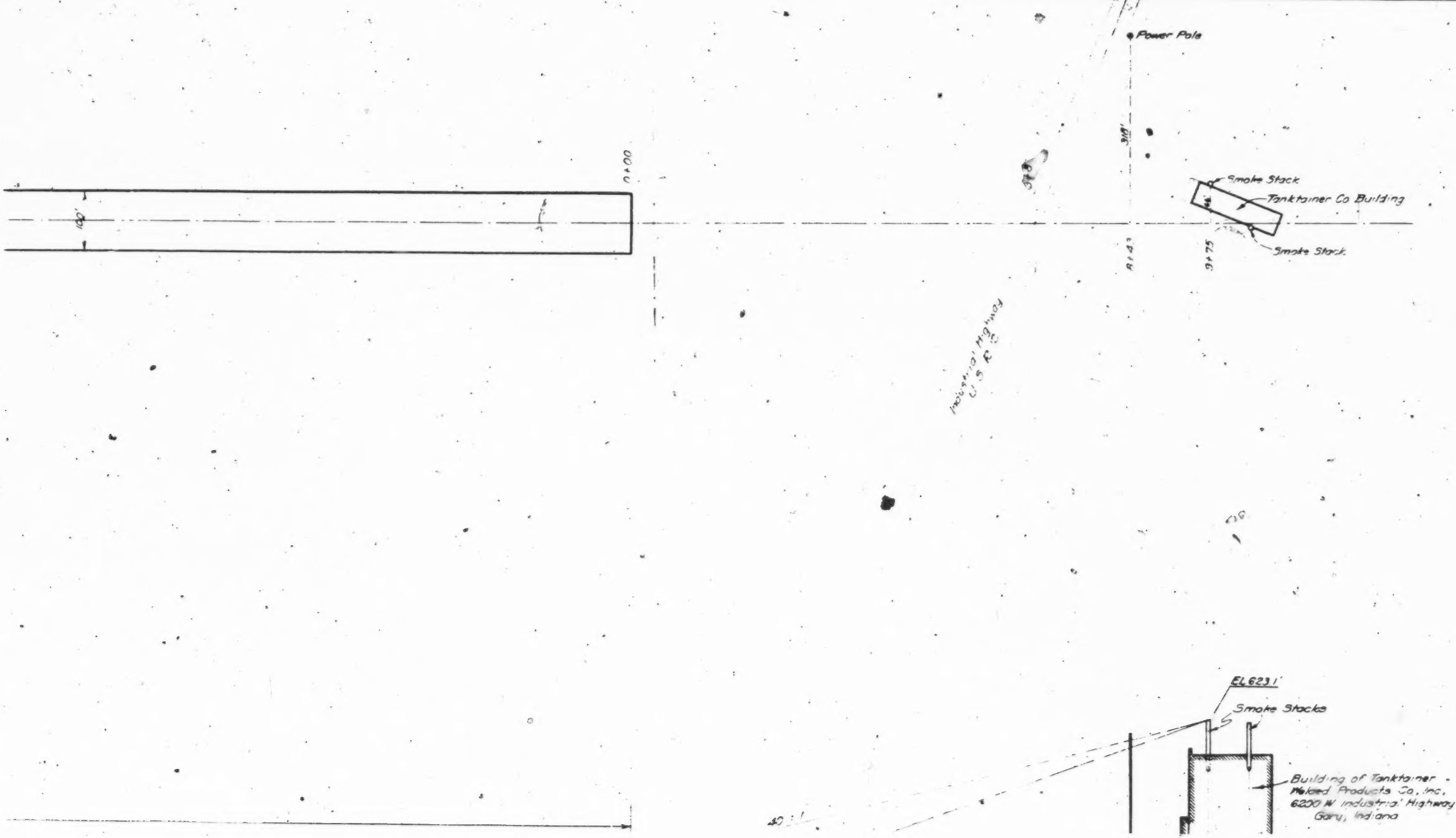
Circuit Court of
nty, Indiana

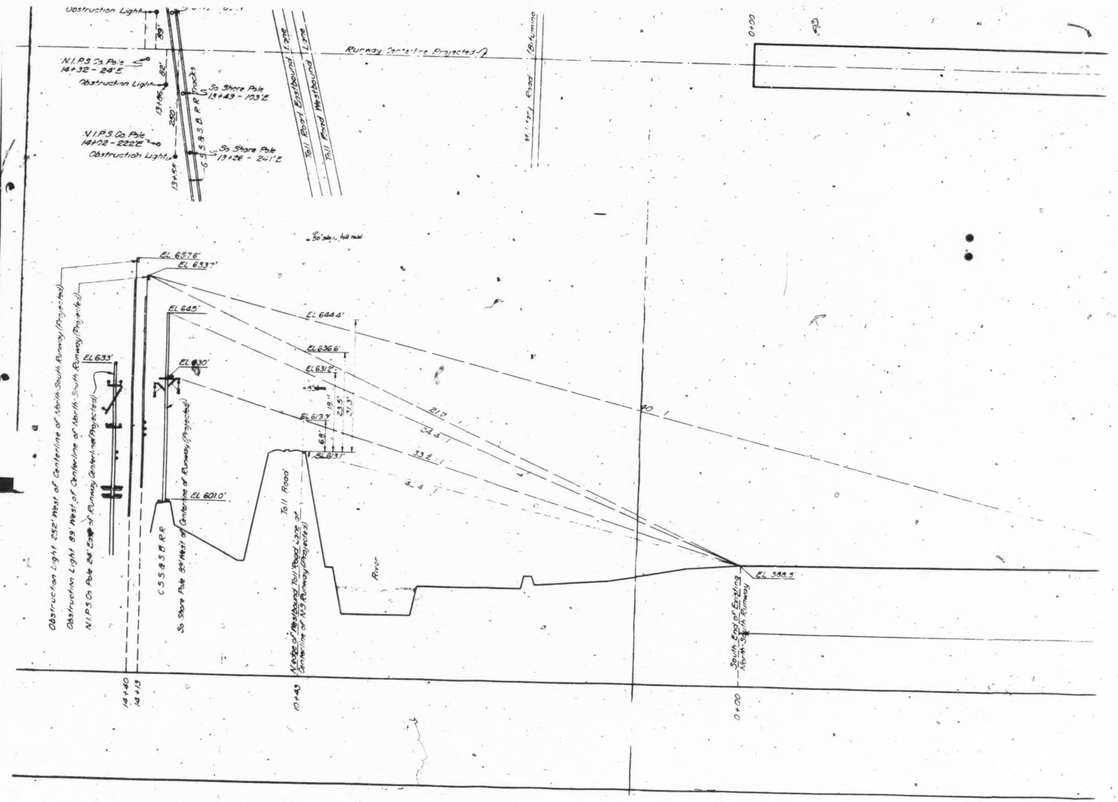
Exhibit No. A

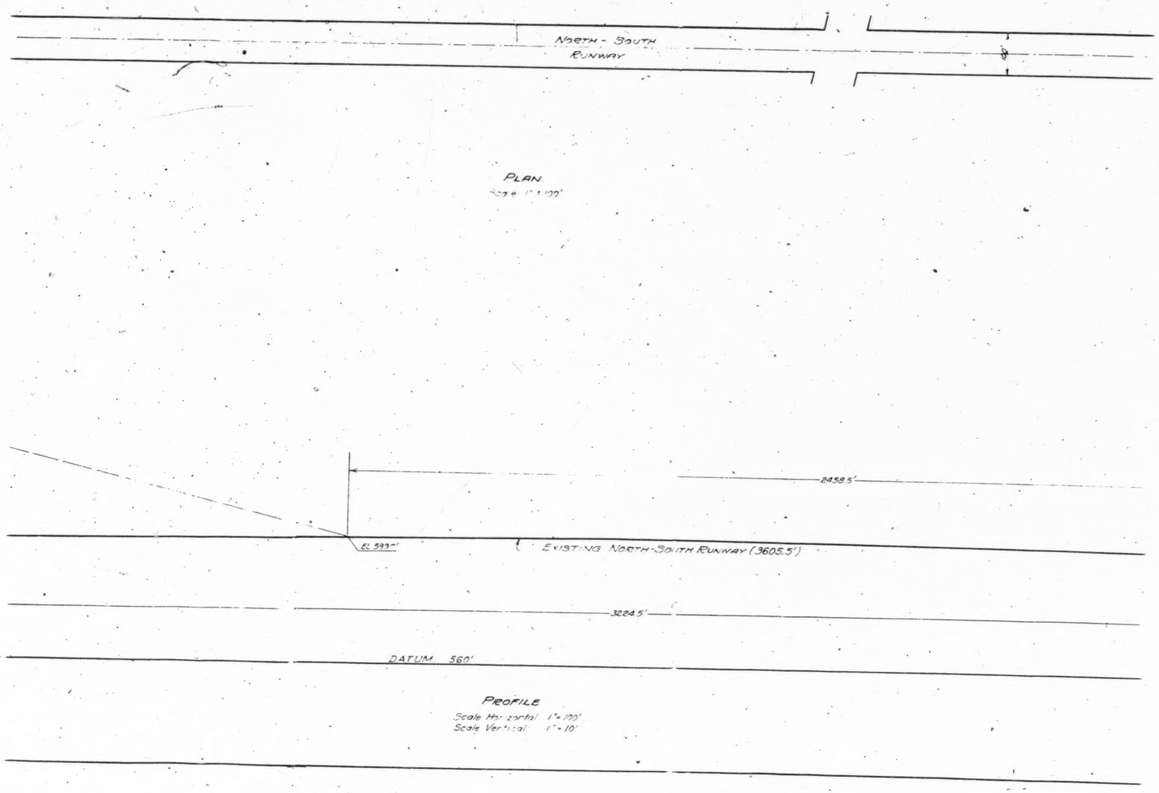


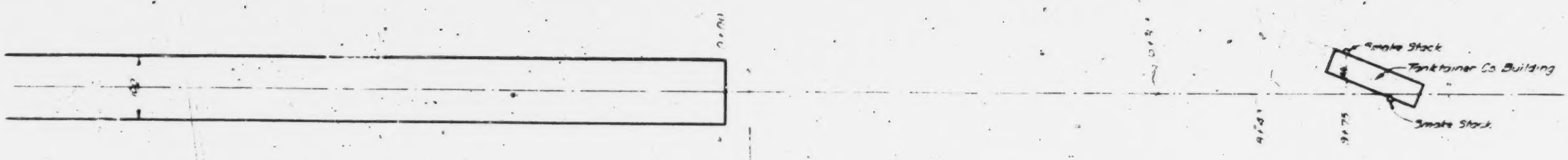


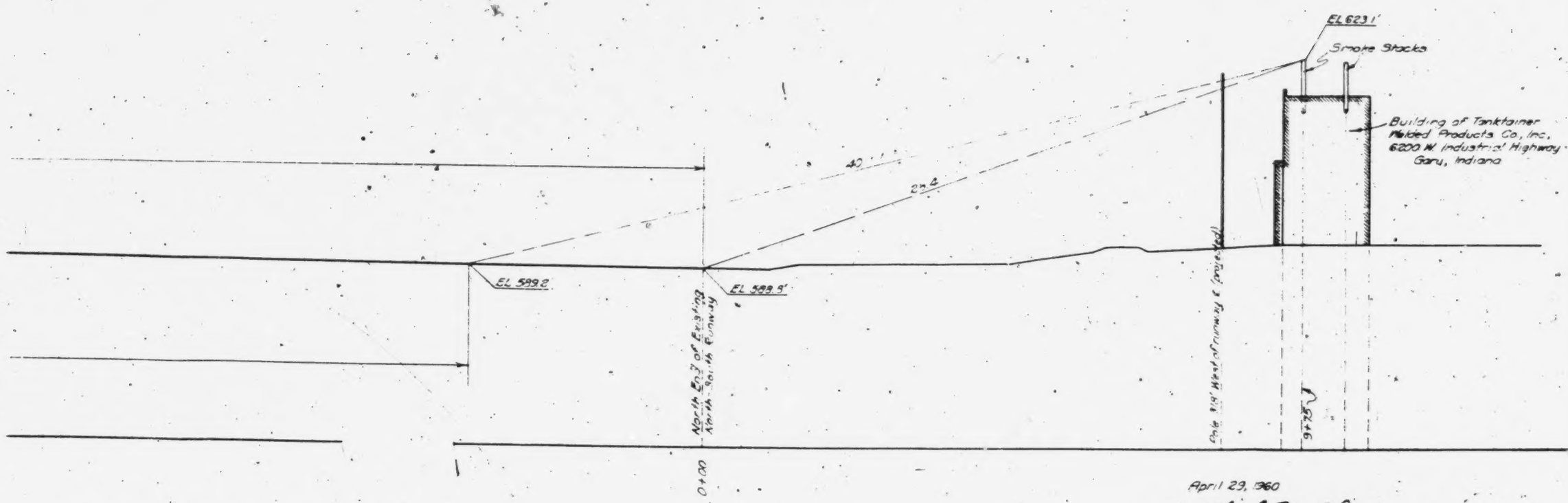
PLAN


Power Pole
Smoke Stack
Tanktainer Co Building
Smoke Stack
0+00
1+43
2+75
EL 623.1'
Smoke Stacks
Building of Tanktainer - Maxed Products Co., Inc. 6200 W Industrial Highway Gary, Indiana


Obstruction Light
N.I.P.S. Co. Pole 14+32 - 84'E
Obstruction Light
N.I.P.S. Co. Pole 14+02 - 222'E
Obstruction Light
So. Shore Pole 13+43 - 193'E
So. Shore Pole 13+26 - 241'E
Runway (existing & projected)
Toll Road Relocated
Toll Road Abandoned
Toll Road
EL 627.6'
EL 633'
EL 685'
EL 655'
EL 630'
EL 644.4'
EL 636.6'
EL 631.2'
EL 607'
EL 601'
EL 601.1'
EL 601.0'
Obstruction Light 252' West of Centerline of North-South Runway (Projected)
Obstruction Light 89' West of Centerline of North-South Runway (Projected)
N.I.P.S. Co. Pole 84' East of Centerline of Runway (Projected)
C.S.S.&S.F.R.R.
So. Shore Pole 84' West of Centerline of Runway (Projected)
Toll Road
Toll Road 132' West of Centerline of N-S Runway (Projected)
River
EL 588.9
South End of Existing North-South Runway
14+40
14+43
11+43
0+00


North - South Runway
Plan
Scale 1" = 100'
2458.5'
EL 599.1'
Existing North-South Runway (3605.5')
3284.5'
Datum 560'
Profile
Scale Horizontal 1" = 100'
Scale Vertical 1" = 10'





April 29, 1960

Stanley M. Shartle

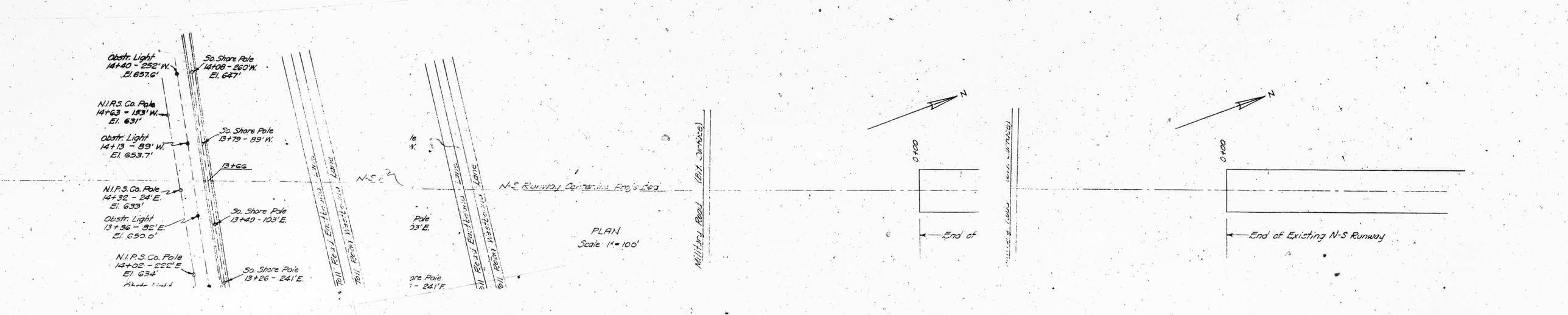
Registered Professional Engineer No 6208

[fol. 1410]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

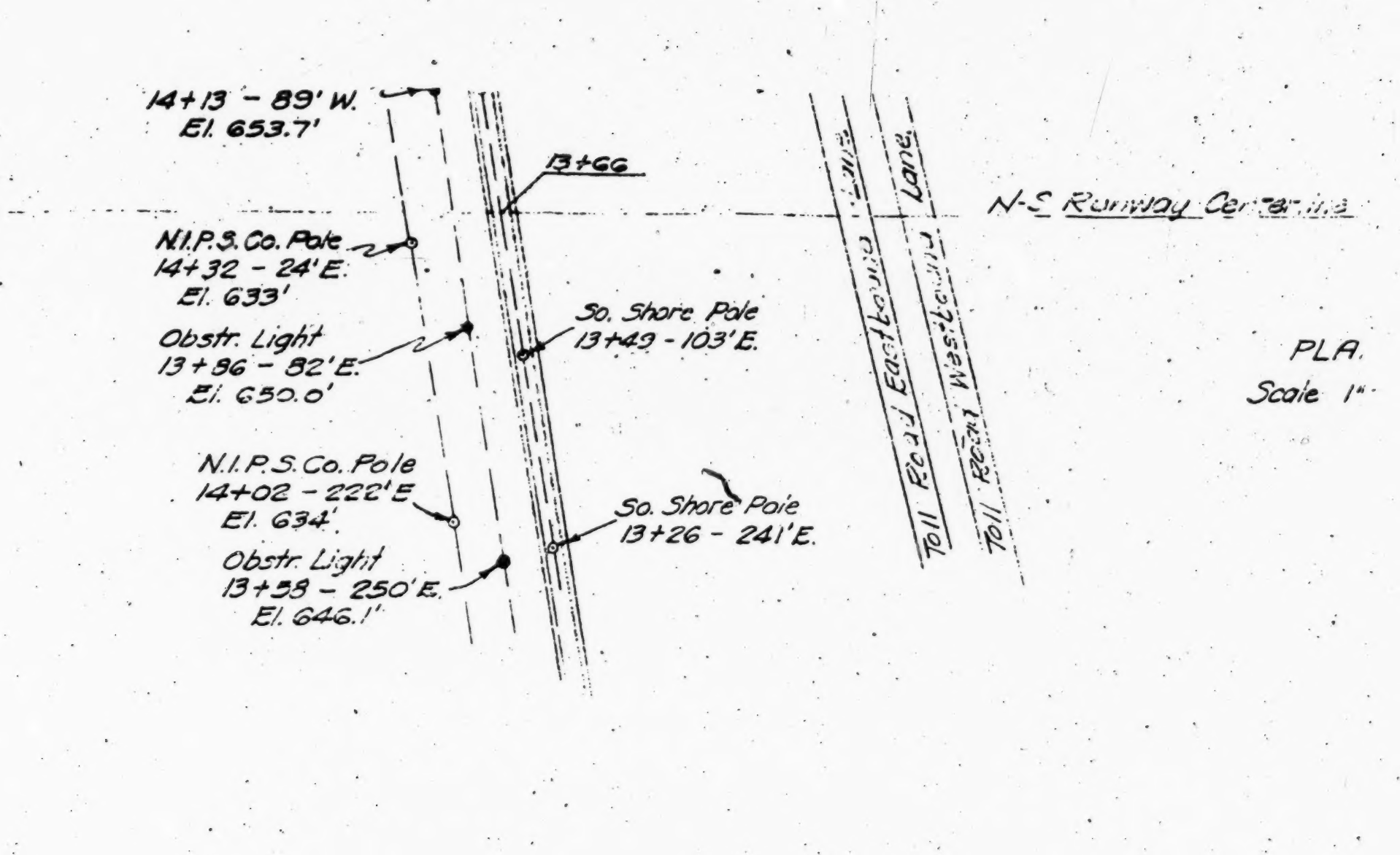
DEFENDANT'S EXHIBIT NO. B

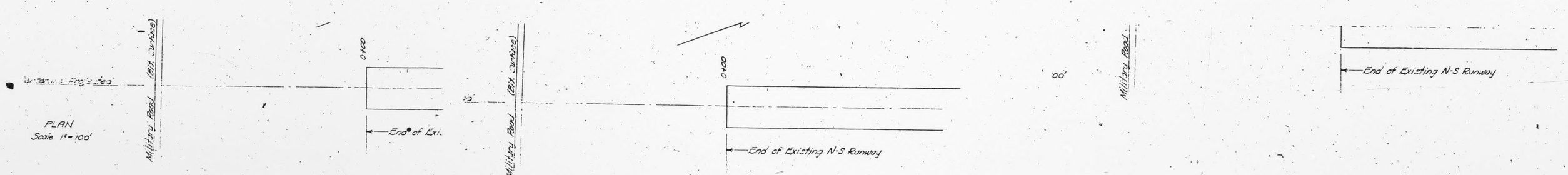
(See Opposite) ☞

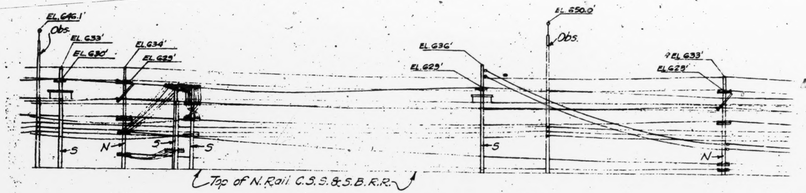

Obstr. Light
14+40 - 252' W.
El. 657.6'
So. Shore Pole
14+08 - 260' W.
El. 647'
N.I.P.S. Co. Pole
14+63 - 183' W.
El. 631'
Obstr. Light
14+13 - 89' W.
El. 653.7'
So. Shore Pole
13+79 - 99' W.
13+66
N.I.P.S. Co. Pole
14+32 - 24' E.
El. 633'
Obstr. Light
13+96 - 82' E.
El. 650.0'
So. Shore Pole
13+49 - 103' E.
N.I.P.S. Co. Pole
14+02 - 222' E
El. 634'
So. Shore Pole
13+26 - 241' E.
Toll Road Eastbound Lane
Toll Road Westbound Lane
N-S Runway Centerline Projected
Military Road (Ext. Junction)
PLAN
Scale 1" = 100'
N
End of
End of Existing N-S Runway

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. B


14+13 - 89' W.
El. 653.7'
13+66
N-S Runway Center Line
N.I.P.S. Co. Pole
14+32 - 24' E.
El. 633'
Obstr. Light
13+86 - 82' E.
El. 650.0'
So. Shore Pole
13+49 - 103' E.
N.I.P.S. Co. Pole
14+02 - 222' E
El. 634'
Obstr. Light
13+58 - 250' E.
El. 646.1'
So. Shore Pole
13+26 - 241' E.
Toll Road East bound Lane
Toll Road West bound Lane
PLA
Scale 1"

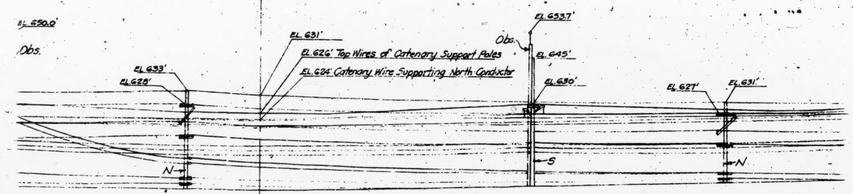

Military Road (Bit. Surface)
End of Existing N-S Runway
PLAN
Scale 1"=100'
Military Road (Bit. Surface)
End of Existing N-S Runway
Military Road
End of Existing N-S Runway



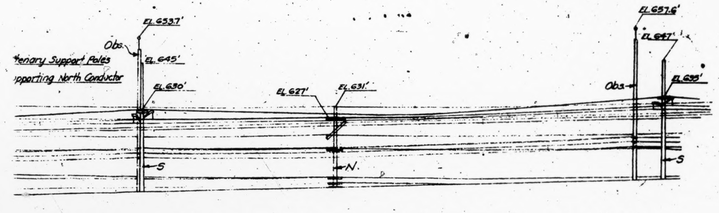
LEGEND

Obs - Obstruction Light & Pole
N - N.I.P.S.Co. Pole
S - C.S.S.&S.B.R.R. Pole

DATUM 550'

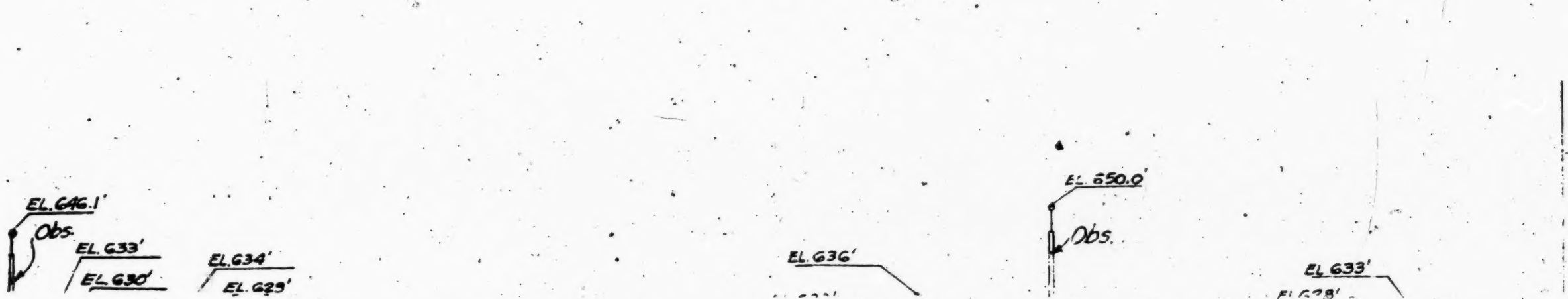


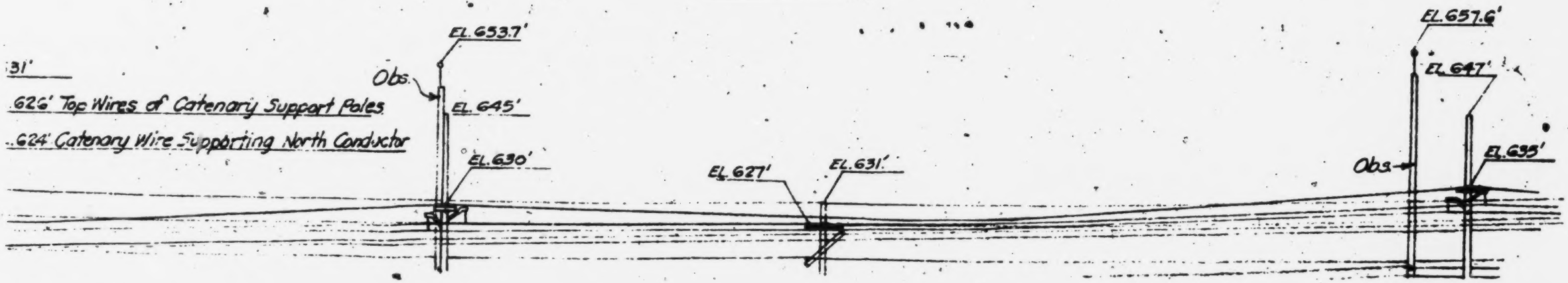
Scale 1" = 20'



April 27, 1960

Stanley M. Shartle
Reg. Prof. Eng. No. 6208


EL. 646.1'
Obs.
EL. 633'
EL. 630'
EL. 634'
EL. 629'
EL. 636'
EL. 650.0'
Obs.
EL. 633'

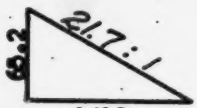
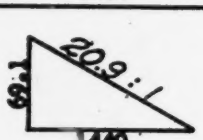
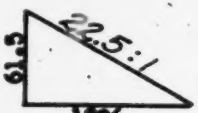

31'
626' Top Wires of Catenary Support Poles
624' Catenary Wire Supporting North Conductor
EL. 653.7'
Obs.
EL. 645'
EL. 630'
EL. 627'
EL. 631'
EL. 657.6'
EL. 647'
Obs.
EL. 635'

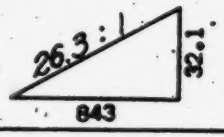
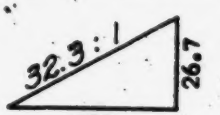
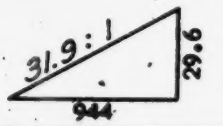
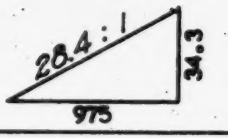
[fol. 1411]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. C

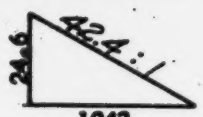
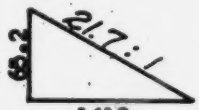
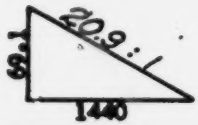
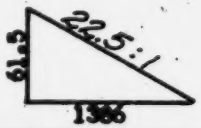
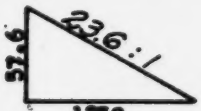
(See Opposite) ☞

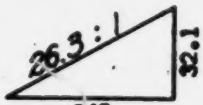
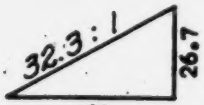
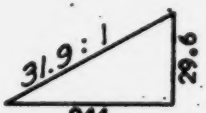
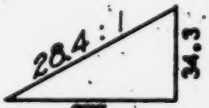
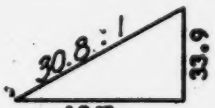
SOUTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.5')
Top of Tall Reed at Runway Centerline Projected (EL. 613.1')	
Obstruction Light 89' West of Runway Centerline Projected (EL. 653.7')	
Obstruction Light 252' West of Runway Centerline Projected (EL. 657.6')	
Obstruction Light 82' East of Runway Centerline Projected (EL. 650.0')	
Obstruction Light	

NORTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.8')
Power Pole 318' West of Runway Centerline Projected (EL. 620.9')	
Power Pole 182' West of Runway Centerline Projected (EL. 615.5')	
Top of Tanktainer Company Building (EL. 618.4')	
Smoke Stack Tanktainer Company Building (EL. 623.1')	
Smoke Stack	

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. C

SOUTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.5')
Top of Tell Road at Runway Centerline Projected (EL. 613.1')	
Obstruction Light 89' West of Runway Centerline Projected (EL. 653.7')	
Obstruction Light 252' West of Runway Centerline Projected (EL. 657.6')	
Obstruction Light 82' East of Runway Centerline Projected (EL. 650.0')	
Obstruction Light 250' East of Runway Centerline Projected (EL. 646.1')	

NORTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.8')
Power Pole 318' West of Runway Centerline Projected (EL. 620.9')	
Power Pole 182' West of Runway Centerline Projected (EL. 615.5')	
Top of Tanktainer Company Building (EL. 618.4')	
Smoke Stack Tanktainer Company Building (EL. 623.1')	
Smoke Stack Tanktainer Company Building (EL. 622.7')	

[fol. 1412]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT No. P

MINUTES OF THE REGULAR MEETING OF THE BOARD OF AVIATION COMMISSIONERS OF THE CITY OF GARY HELD MONDAY, MARCH 22, 1954, IN THEIR OFFICES IN THE CITY HALL AT GARY, INDIANA, AT 1:30 P. M.

Present: Messers. Samuel P. Moise
Michael Lobo
C. W. Bader

Also present; Nick Jankovich

Mr. Moise called the meeting to order after which the minutes of March 10 were approved as read.

Mr. Moise read a letter from the C. A. A. in regard to the construction of an access road on the Gary Municipal Airport to be built for the military project by the Department of Defense, which letter is in the following words and figures, to-wit:

"March 17, 1954

Mr. Samuel F. Moise, President
Department of Aviation
City of Gary
Gary, Indiana

Dear Mr. Moise:

Reference is made to your letter dated March 12, 1954, concerning an approval by this Administration for the construction of an access road on the Gary Municipal Airport, Gary, Indiana, by the Department of Defense, its location being approximately 130 feet south of the existing N/S runway crossing the centerline extended at right angles.

During our meeting on March 11 with the Board of Aviation Commissioners, which was attended by Mr. Nurmi of the Corps of Engineers, we opposed the above location, based on three considerations:

1. Our airport design criteria, in the interest of safety, calls for a minimum clearance of 15 feet over highways, which is impossible to achieve at the proposed road location.

2. If the road is constructed in this location, it appears it will be necessary, in the interest of safety, to reduce the effective length of the runway for landings from the south to the north in order to get a 15-foot highway clearance.

3. Location of the road eliminates any possible runway extension to the south.

[fol. 1413] While it is recognized that the road is within the boundaries of the airport, its use will not be for normal airport maintenance equipment; rather, it will be used by many and various types of automobile equipment in serving its primary purpose.

Due to the prevailing winds, the N/S runway is the primary runway and any required reduction in its length will seriously affect aircraft movement into the airport. Realizing the necessity for this runway, Federal funds have been used to lengthen the runway and for lighting of obstructions in the south approach.

In view of the above, we cannot approve the location as shown by the Corps of Engineers. We consider the roadway should be located the required distance from the end of the runway necessary to achieve a minimum of 15′ clearance over the roadway, based on the existing controlling 27:1 glide path. The obstruction clearance line will begin at a point on the extended centerline of the runway 200′ beyond and at the same elevation as the end of the runway pavement.

During our meeting a lease from the City of Gary to the United States, executed by the mayor in February 1954, was examined. The Board of Aviation Com-

missioners had retroactively authorized the execution of the lease by the mayor as is apparently required by the Indiana Statute. The lease is apparently the standard Corps of Engineers lease, being for a ten-year term with a right of renewal for another ten years. The Exhibit "A" thereto is incorporated and delineates the three parcel areas leased as well as the location of the access road. Concerning the Exhibit "A," we call your attention to the fact that the actual area leased under the instrument for the access road is different from that shown on the Corps of Engineers plans; in fact, it appears that the area legally demised would close the end of the existing N/S runway as extended to the south under the FAAP project. It was agreed by the Corps of Engineers representative that a copy of the lease would be forwarded for our review.

During the meeting the Board brought to our attention that they may desire to lease certain parcels of airport property for the erection of a hotel. In order that we may determine whether such construction will interfere with the normal development of the airport in accordance with the Master Plan and that any lease entered into will not place the city in default on any obligation to the United States relative to the development, operation, or maintenance of the airport, it is requested that we be given the opportuntiy to review all such proposals before execution by the city. Concerning leases and operating agreements in general, we confirm the understandings previously had with our District Airport Office that we desire submissions of all such instruments for our review prior to their execution by the city.

We are very pleased with the operations and the housekeeping of your airport and desire you to know that our continued interest in your airport matters is only to assist and give to you our airport experience and advice concerning the many airport problems which aviation is confronted with today.

[fol. 1414] Mr. James Waedekin, Acting District Airport Engineer, located in our District Airport Office at 124 W. Ottawa Street, Lansing, Michigan, will be glad to confer with you on all such above matters; also, feel free to call upon me if I can be of any further assistance to you.

Very truly yours,

/s/ W. H. Erickson
William H. Erickson
Chief, Airports Division"

Upon motion duly made, seconded and unanimously carried, it was resolved by the Board of Aviation Commissioners that they hereby go on record, in view of the position taken by the C. A. A. as verified by correspondence from them, that, in so far as the N/S Runway is concerned at the Gary Municipal Airport, the Board refuse to permit the military project to be installed, unless the egress and ingress road is moved at least 400 feet South of the North edge of the N/S Runway and that a copy of the foregoing be sent to Colonel Kromer of the United States Corps of Engineers.

An exhibit submitted by Ozark Airlines, Inc. to the C. A. B. was shown to the Board which had been received by the Mayor, showing that they were trying to consolidate with North Central and Lake Central to give better service.

A letter was ordered written to the C. A. B. asking if they couldn't withhold delinquent rents due the City from the subsidies paid Lake Central and sending them statement of delinquent rents. A copy of this letter was ordered sent to Lake Central Airlines.

The matter of proposed hotel-motel was discussed and it was agreed by the Board that they would meet with Mr. H. E. Graham, Jr. on April 9 and ordered the Clerk to write Mr. Graham informing him of same.

The Clerk informed the Board that a wage determination had been filled out and sent in to C. A. A. in regard to the

obstruction lights to be installed by the Chicago, South Shore and South Bend Railroad.

There being no further business to be brought before the meeting, same was adjourned.

BOARD OF AVIATION COMMISSIONERS

/s/ SAMUEL P. MOISE

/s/ C. W. BADER

/s/ M. J. LOBO

ATTEST:

/s/ TED SIKORA
Secretary

[fol. 1415]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT "V"

[fol. 1416]

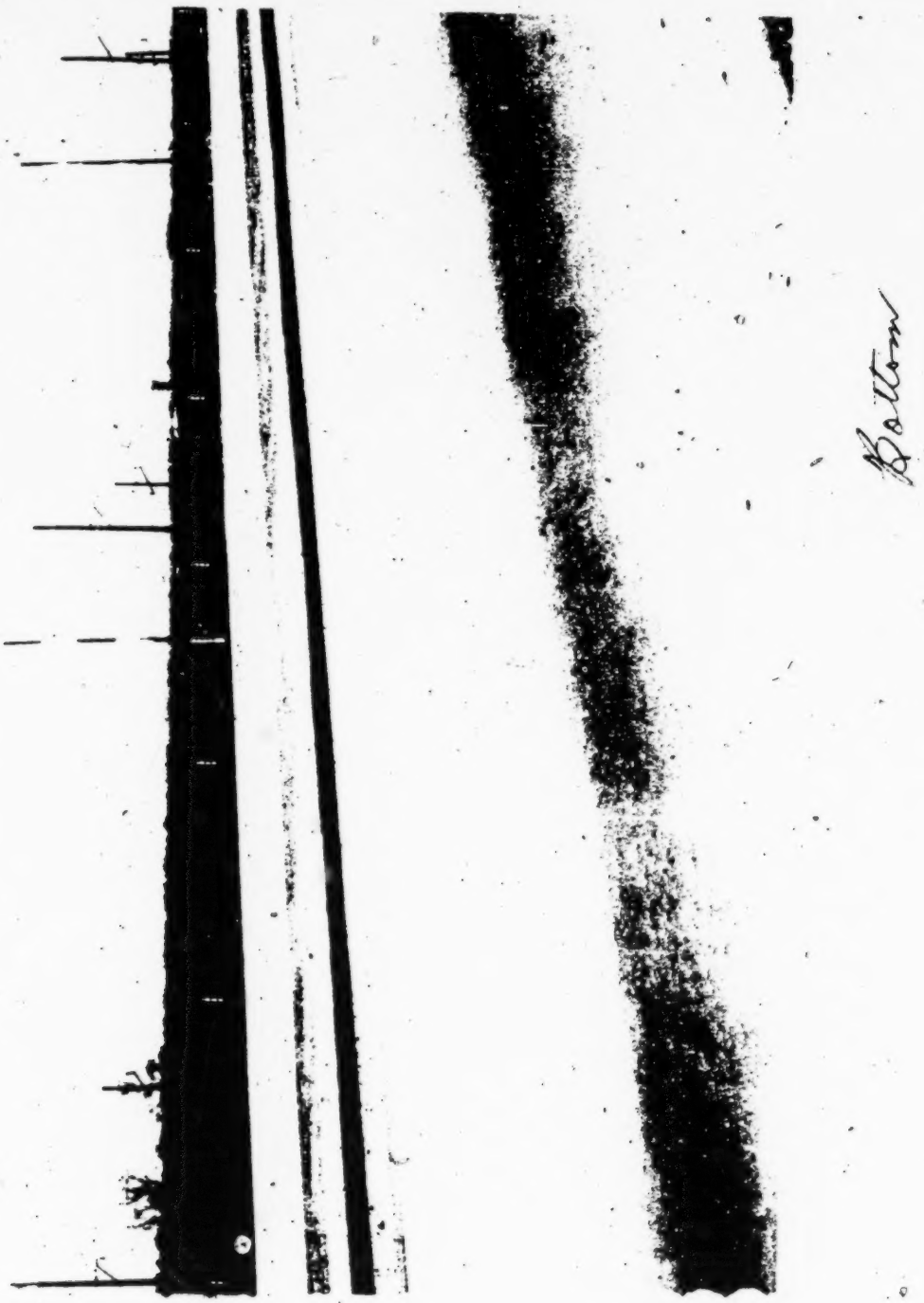
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT "W"

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. W



Bottom

[fol. 1417]

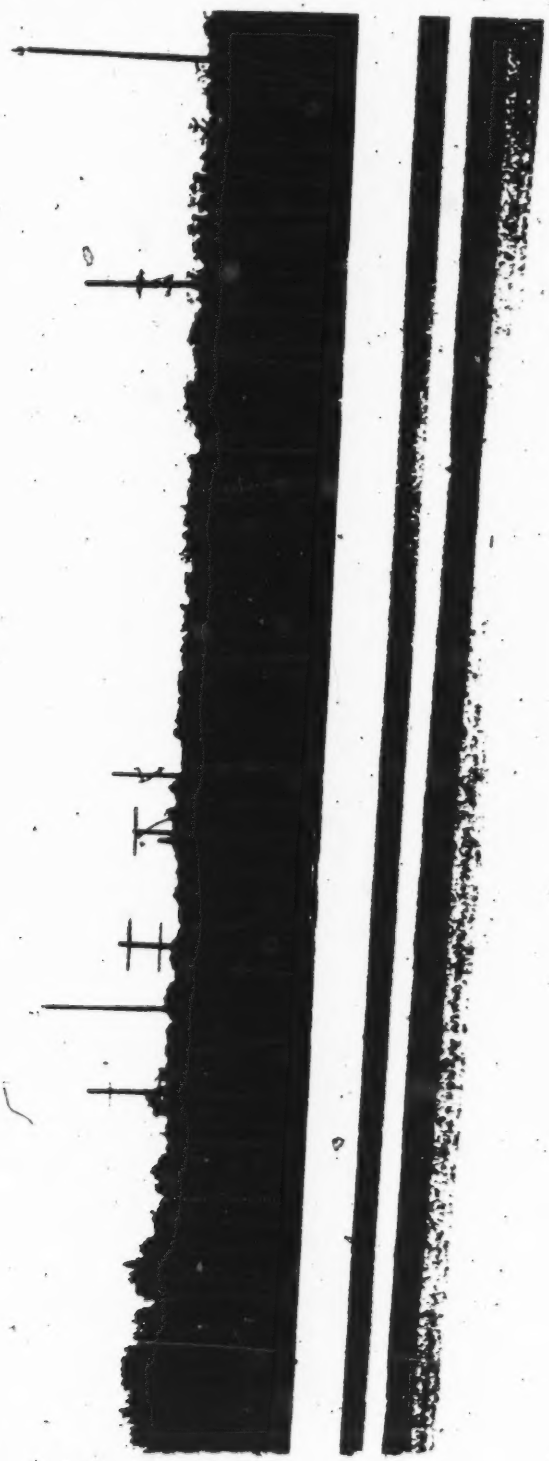
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT X

(See Opposite) ☞

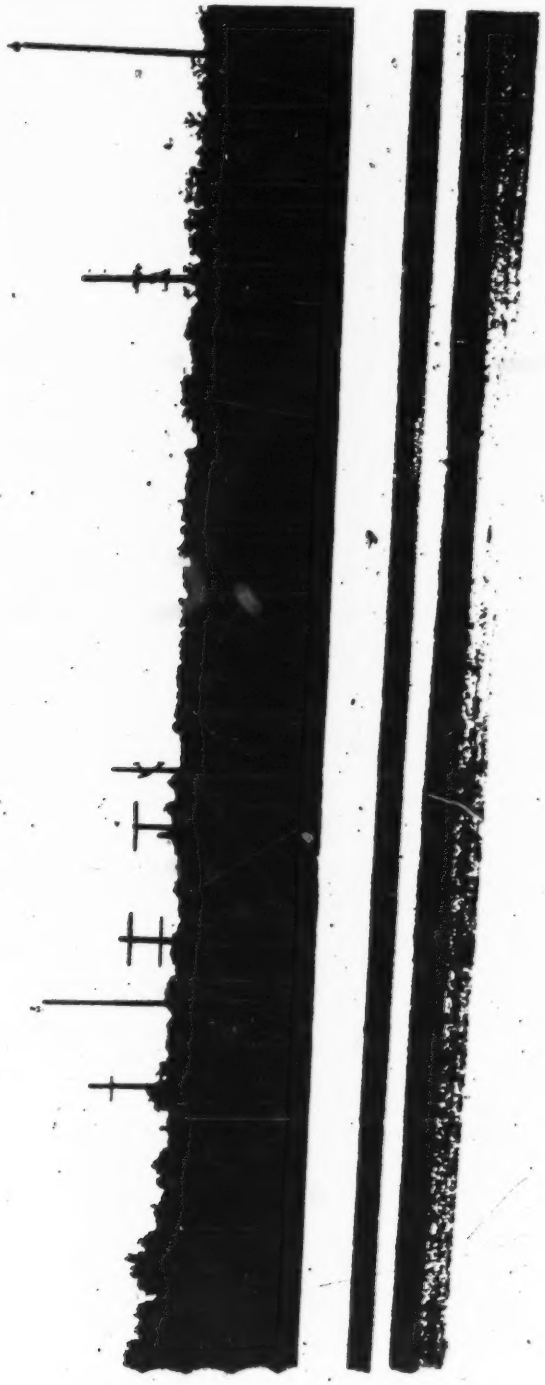
In the Porter Circuit Court of
Porter County, Indiana

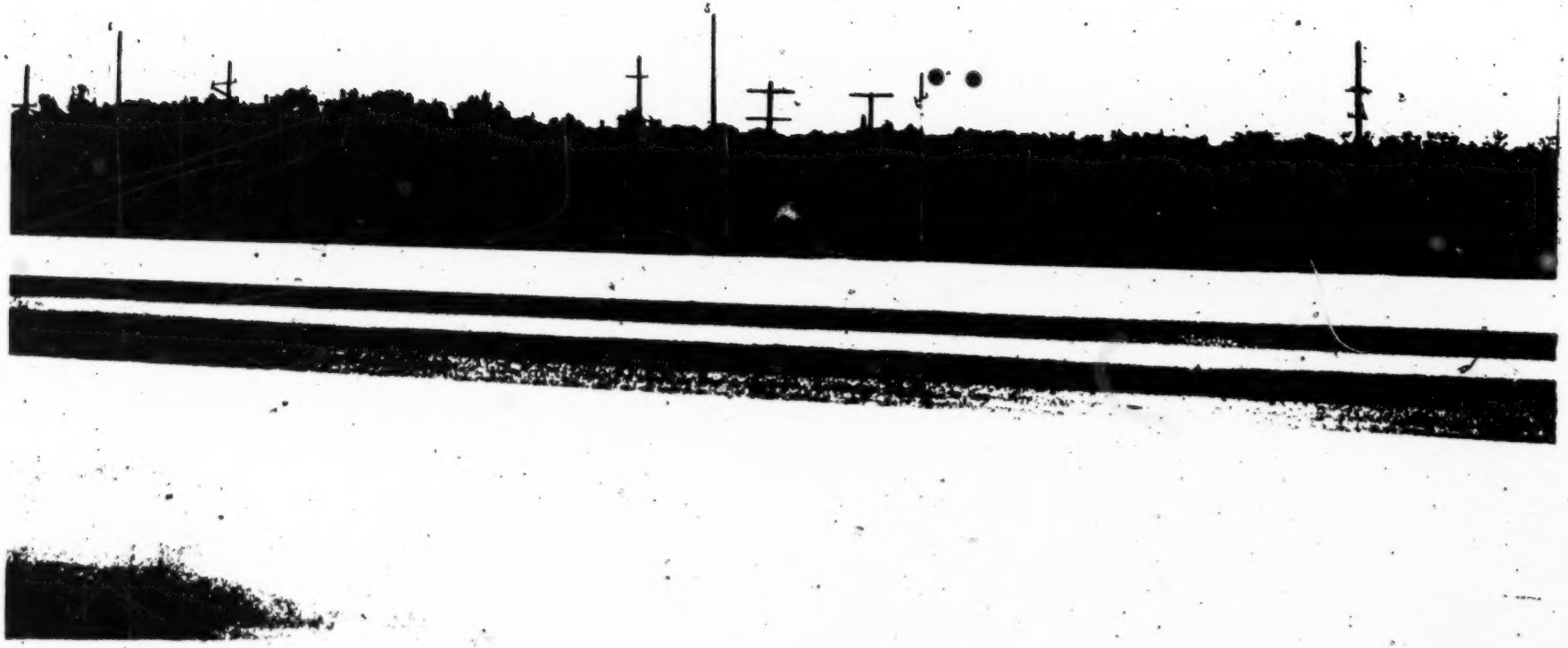
Defendant's Exhibit No. X



In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. X





[fol. 1418]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. HH

THIRD AMENDMENT TO GRANT AGREEMENT

Contract No. C3ea-7030
Gary Municipal Airport
Gary, Indiana
Project No. 9-12-007-103
Date: June 20, 1955

WHEREAS, The Administrator of Civil Aeronautics (hereinafter called the "Administrator"), has determined that, in the interest of the United States, the Grant Agreement relating to the above numbered project, between the Administrator, acting for and on behalf of the United States, and the City of Gary, Indiana (hereinafter called the "Sponsor"), accepted by the Sponsor on June 28, 1951, should be amended as hereinafter provided.

NOW, THEREFORE, WITNESSETH:

That in consideration of the benefits to accrue to the parties hereto, the Administrator, acting for and on behalf of the United States, on the one part, and the City of Gary, Indiana, on the other part, do hereby mutually agree that the said Grant Agreement be and hereby is amended by increasing the maximum obligation of the United States payable under said Grant Agreement, as amended, from $82,000 to $90,200.

IN WITNESS WHEREOF, the parties hereto have caused this Third Amendment to said Grant Agreement to be duly executed as of the 24th day of June, 1955.

UNITED STATES OF AMERICA
ADMINISTRATOR OF CIVIL AERONAUTICS

By /s/ WILLIAM B. DAVIS
Regional Administrator,
Region III

CITY OF GARY, INDIANA

By /s/ SAMUEL P. MOISE, PRES.
Title President, Board of Aviation
Commissioners

Title Secretary, Board of Aviation
(SEAL)

Attest

/s/ TED SIKORA
Title Secretary, Board of Aviation
Commissioners

1419]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. QQ

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. QQ

NO. 61 8-0071	**AIRPORT FACILITIES RECORD**	INSPECTED BY R. L. Stephenson	DATE 1-30-53
AIRPORT NAME	Gary Municipal Heliport	(16) TYPE Municipal	(17) CLASS 3
CITY AND STATE	Gary, Indiana (East Chicago, Indiana)	(17a) A. C. SERVICE CATEGORY 42 NW-SE (T)	
COUNTY	Lake MET AREA Chicago	(18) SERVED BY (Airline (s)) LCA (By 2-2?-53) Helicopter Air Service, Inc.	

19	PROPERTY OWNER City of Gary	57	CITY POPULATION 133,911
20	ADDRESS City Hall Gary, Indiana	58	LANDING AREA EXPANDABLE Yes DIRECTION AND EXTENT SE 1000'
21	OPERATOR Board of Aviation Commissioners	59	MAINTENANCE PERFORMED MOWING Yes SNOW Yes OTHER Gen. Maint.
22	ADDRESS City of Gary City Hall, Gary, Indiana	60	OFFICE OR ADMINISTRATION BUILDING (Specify) SIZE 20x30' Adm. Bldg. TYPE CONSTRUCTION Frame
	MANAGER Nich Jankovich	61	FIRE EQUIPMENT (Kind) Hand Extgr.
23	LATITUDE 41° 37' 00" LONGITUDE 87° 24' 45" ELEVATION 590' S	62 63 64	CONTROL TOWER (Operated by) RADIO (Ground to air) No ASSOC. RANGE STATION
24	DISTANCE AND DIRECTION FROM CITY 4.7 Stat. Mi. WNW	65	INSTRUMENT APPROCH SYSTEM
	LANDMARKS (Distance and Direction) U.S. Hwy. #12 North Boundary EJ & E RR West Boundary Grand Calumet River South Boundary	66 67	CAA COMMUNICATION STATION No WEATHER SERVICE (Type) AB ? Radio AT AIRPORT OR BY TELEPHONE Tel.
25	FIELD MARKINGS: BOUNDARY None OTHER Seg. circle near hangar area	68	TELEPHONE (Number) 53808 TELETYPE No TELEGRAPH By Telephone
26	TOTAL ACRES 617.37	69	DISTANCE TO RAIL TRANSFER POINT 1.8 M. NAME OF RAILROAD South Shore RR
27	DRAINAGE (Type) Subsurface	70	MEALS AT AIRPORT No
	TYPE OF SOIL Sand	71	LODGING AT AIRPORT No

28	RUNWAYS OR LANDING STRIPS								APRONS AND TAXIWAYS
29	DIRECTION	N-S		NW-SE					APRONS (Sq. yd.) 12,500
30	LENGTH	3100'		4600'					TAXIWAYS (Lin. ft.) 850'
31	WIDTH	100'		100'					LANDING AREA CONDITION
32	BASE	9"Slag		9"Slag					Good
33	SURFACE	1"Bit.		1"Bit.					Use paved runways only
34	GR. LDG. CAP	30,000# Single							

35	LANDING LIGHTS		IDEN. LIGHTS	WIND AND TRAFFIC INDICATORS	HANGARS					
36	RUNWAY (No. Runs.)	?	ROTATING BEACON	CONE Yes	NUMBER OF	DIMENSIONS	CONSTRUCTION	NUMBER OF	DIMENSIONS	CONSTRUCTION
37	BOUNDARY	No	SIZE	LIGHTED No	3-10T	80x209'	Metal			
38	THRESHOLD	Yes	COLOR	TEE Yes	1	140'x120'	Metal-Operator's Office			connected
39	FLOOD	No	CODE BEACON	LIGHTED Yes						
40	OBSTRUCTION	No	LOC.	TETRAH'N No						
41	APPROACH	No	CODE	LIGHTED						
42	OTHER	No	COURSE LIGHTS	SEG. CIRCLE Yes						
43	OPERATING SCHEDULE		LOC		NUMBER OF BASED AIRCRAFT		OTHER MAJOR BUILDINGS			
44	Request-Adv. notice (Elevated H.I.)		CODE		40		None			
45			OPERATING SCHEDULE		SPACE FOR TRANSIENTS					
46			No beacon		HANGAR	TIE-DOWN				
47					Yes	Yes				

48	FIXED BASE OPERATORS	ACTUAL AIRCRAFT SERVICES AVAILABLE
49		
50		

19	PROPERTY OWNER	City of Gary	
20	ADDRESS	City Hall Gary, Indiana	
21	OPERATOR	Board of Aviation Commissioners	
22	ADDRESS	City of Gary City Hall, Gary, Indiana	
	MANAGER	Nich Jankovich	
23	LATITUDE	41° 37' 00"	
	LONGITUDE	87° 24' 45"	
	ELEVATION	590' S	
24	DISTANCE AND DIRECTION FROM CITY	4.4 Stat.Mi.WNW	
	LANDMARKS (Distance and Direction)	U.S. Hwy. #12 North Boundary EJ & E RR West Boundary Grand Calumet River South Boundary	
25	FIELD MARKINGS: BOUNDARY	None	
	OTHER	Seg. circle near hangar area	
26	TOTAL ACRES	617.37	
27	DRAINAGE (Type)	Subsurface	
	TYPE OF SOIL	Sand	

57	CITY POPULATION	133,911
58	LANDING AREA EXPANDABLE	Yes
	DIRECTION AND EXTENT	SE 1000'
59	MAINTENANCE PERFORMED: MOWING	Yes
	SNOW	Yes
	OTHER	Gen.Maint.
60	OFFICE OR ADMINISTRATION BUILDING (Specify)	
	SIZE	28x30' Adm. Bldg.
	TYPE CONSTRUCTION	Frame
61	FIRE EQUIPMENT (Kind)	Hand Extgr
62	CONTROL TOWER (Operated by)	
63	RADIO (Ground to air)	No
64	ASSOC. RANGE STATION	
65	INSTRUMENT APPROCH SYSTEM	
66	CAA COMMUNICATION STATION	No
67	WEATHER SERVICE (Type)	AB ? Radio
	AT AIRPORT OR BY TELEPHONE	Tel.
68	TELEPHONE (Number)	5308
	TELETYPE	No
	TELEGRAPH	By Telephone
69	DISTANCE TO RAIL TRANSFER POINT	1.8 M.
	NAME OF RAILROAD	South Shore RR
70	MEALS AT AIRPORT	No
71	LODGING AT AIRPORT	No

RUNWAYS OR LANDING STRIPS

DIRECTION	N-S		NW-SE					
LENGTH	3100'		4600'					
WIDTH	100'		100'					
BASE	9"Slag		9"Slag					
SURFACE	1"Bit.		1"Bit.					
GR. LDG. CAP	30,000# Single							

APRONS AND TAXIWAYS

APRONS (Sq. yd.)	12,500
TAXIWAYS (Lin. ft.)	850'
LANDING AREA CONDITION	Good
	Use paved runways only

LANDING LIGHTS		**IDEN. LIGHTS**	**WIND AND TRAFFIC INDICATORS**
RUNWAY (No. Rwys.)	?	ROTATING BEACON	CONE Yes
BOUNDARY	No	SIZE	LIGHTED No
THRESHOLD	Yes	COLOR	TEE Yes
FLOOD	No	CODE BEACON	LIGHTED Yes
OBSTRUCTION	No	LOC.	TETRAH'N No
APPROACH	No	CODE	LIGHTED
OTHER	No	COURSE LIGHTS	SEG. CIRCLE Yes
OPERATING SCHEDULE	Request-Adv.notice (Elevated R.I.)	LOC.	
		CODE	
		OPERATING SCHEDULE	No beacon

HANGARS

NUMBER OF	DIMENSIONS	CONSTRUCTION	NUMBER OF	DIMENSIONS	CONSTRUCTION
3-10T	80x209'	Metal			
1	140'x120'	Metal	Operator's Office		connected

NUMBER OF BASED AIRCRAFT	40
SPACE FOR TRANSIENTS	
HANGAR	Yes
TIE-DOWN	Yes
OTHER MAJOR BUILDINGS	None

FIXED BASE OPERATORS

AIRPORT ATTENDED (State when): Days only

ACTUAL AIRCRAFT SERVICES AVAILABLE

NAME OF OPERATOR	FUEL: TYPE STORAGE	FUEL: CAPACITY	FUEL: OCTANE	HANGAR STORAGE	REPAIRS: MAJOR A-E	REPAIRS: MINOR A-E	CHARTER SERVICE	FLIGHT INSTR.	OTHER (Specify)
Calumet Air Service	Tank	12,000	80	Yes	A-E	A-E	Yes	Yes	Sales
	"	12,000	91						Parts
	"	12,000	100						

APPROACHES

	N	NE	E	SE	S	SW	W	NW
STANDARD ZONE: Yes								
EXISTING GLIDE ANGLE	23:1			50:1	23:1			40:1
CONTROLLING OBSTR.	P.Lines			Clear	P.Line			P.Line
DIST. FROM RNWY. END	980'				1580'			1230'

FORM ACA-28 A (2-60) (FACE)

[fol. 1420]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT RR

(See Opposite) ☞

In the Porter Circuit Court of Porter County, Indiana

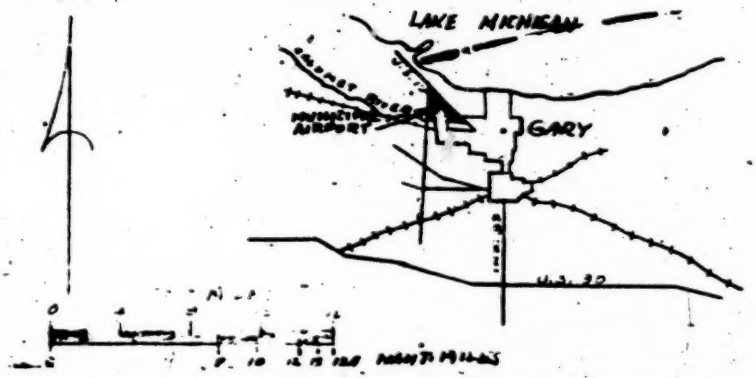
Defendant's Exhibit No. RR

JUNE 21 1957

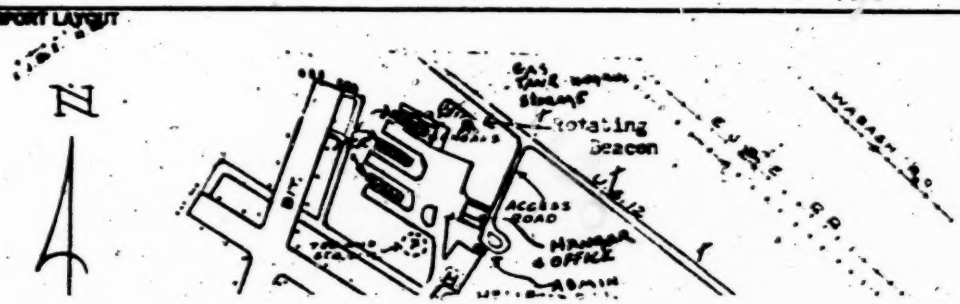
CITY AND STATE: Gary, Indiana	AIRPORT: Gary Municipal		SEC 5803
COUNTY: Lake Ind.	SERVICE TYPE: Trunk		CHART: Chicago
LAT. 41° 37' LONG. 87° 25'	ELEV. 590' S	DIST. AND DIR. FROM CITY: 4 Mi. W	NEAR AIRPORT ATTENDED: See Remarks
OWNER: City of Gary ADDRESS: Gary Hall Gary, Indiana	OPERATOR: Board of Aviation Comm. ADDRESS: City of Gary City Hall, Gary, Indiana		MANAGER: Mr. Nick Jankovich ADDRESS: Gary Municipal Airport Gary, Indiana
FUEL OCTANE: 80-91-100 CAPACITY (GALS.): 36,000	FLIGHT ACTIVITIES: NUMBER OPERATIONS: 1 REPAIRS: Major-Minor A&E ☒ INSTRUCTIONAL ☐ AGRICULTURAL ☐ CHARTER ☐ PATROL, SURVEY, ADVERTISING ☒ OTHER (SPECIFY): Sales		RECOMMENDED CIRCLE: ☒ YES ☐ NO S.A.C. OPERATIONS APPVD: ☒ DAY ☒ NIGHT AIRCRAFT APPVD: DC-3, DC-4, Convair, Martin. AIRLINES: LCA
☐ TOWER ☐ A/G ☐ RADIO ☐ RADAR ☐ BEACON ☐ WEATHER ☐ OTHER (SPECIFY): Private "H" owned & operated by LCA			
FIRE CRASH EQUIP.: Ansul Jeep. Hand Fire Extinguishers.	USED FUNCTIONS: LIGHTED ☒ YES ☐ NO ☒ TEE ☐ SEWE ☐ TETRAHEDRON		
BASED AIRCRAFT: TOTAL 58	LIGHTS: ☐ THRESHOLD ☐ APPROACH ☒ OBSTR TYPE OF REPL.: MI 20-2; 12-30, PR. ☒ REVOLVING BEACON COLOR: CAG		RESTRICTIONS: Airport attended days only for transient airplanes. LCA personnel attend airport for their flights.
BASED TRANS. & PLACE: 10	OPERATION SCHEDULE: Dusk to Dawn		INSPECTED BY: W. W. Scott 5-21-57
BASED MULTI-ENGINE AIRCRAFT: 8	ATTENDED: ☒ YES ☐ NO		

RUNWAY DIRECT. →	20	2	12	30							
APPROACH SLOPE: EFFECTIVE GLIDE ANGLE	20:1	21:1	49:1	50:1							
APPROACH SLOPE: CONTROLLING OBSTRUCTN	Trees	Poles	Poles								
APPROACH SLOPE: DIST. FROM RWY. END	800'	1200'	1620'								

AIRPORT LOCATION

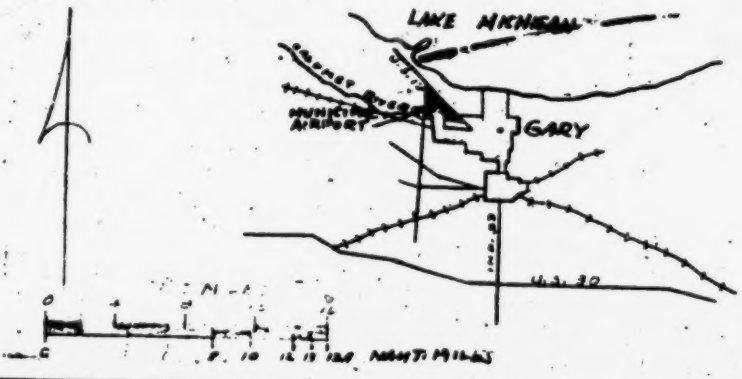


AIRPORT LAYOUT

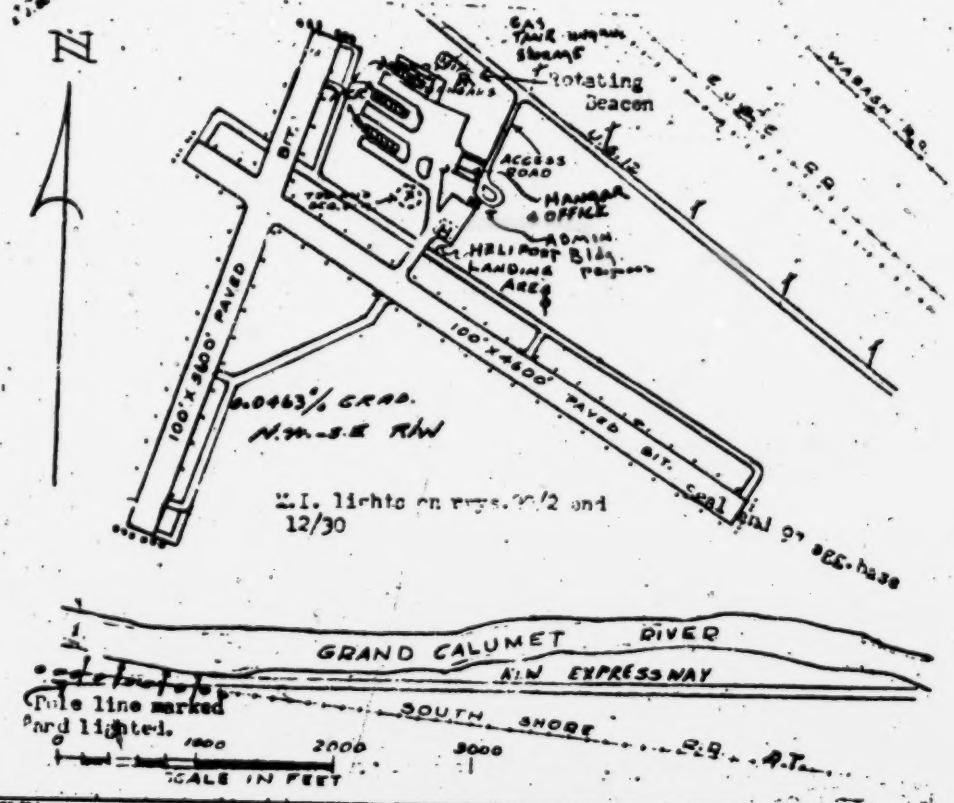


CONTROL & OBSTRUCTN'S	Trees	Poles	Poles
DIST. FROM RWY. END	600'	1200'	1620'

AIRPORT LOCATION



AIRPORT LAYOUT



FORM ACA-50A (6-55)

U.S. DEPARTMENT OF COMMERCE — CIVIL AERONAUTICS ADMINISTRATION

RECORD OF AIRPORT FACILITIES

[fol. 1421] [File endorsement omitted]

Attorneys for Appellant: Robert L. McMahan, South Bend, Indiana; Winfield L. Houran, Valparaiso, Indiana; Paul J. DeVault, Indianapolis, Indiana.

Chester, Clifford, Hoeppner and Houran, and Krieg, DeVault, Alexander & Capehart, Of Counsel.

Attorney for Appellees: Straley Thorpe, Hammond, Indiana.

IN THE SUPREME COURT OF INDIANA

No. 30109

INDIANA TOLL ROAD COMMISSION,
A Body both Corporate and Politic, Appellant,

v.

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, d/b/a Calumet Aviation Company, Appellees.

APPEAL FROM THE PORTER CIRCUIT COURT
Alban M. Smith, Special Judge

OPINION—Filed October 24, 1963

ACHOR, Judge

This is an action for damages alleged to have been sustained by appellees as a result of the construction by appellant of the Indiana East-West Toll Road in violation of a Master Airport Zoning Ordinance of the City of Gary, and the contract rights of appellees as lessees of a portion of the Gary Municipal Airport. The appellees also sought to enjoin and restrain appellant from maintaining the toll road at its present elevation.

The circumstances giving rise to this litigation are as follows: The City of Gary enacted an ordinance in September, 1949, creating an airport commission. The ordinance further purported to incorporate, as a part thereof,

the Gary Airport Zoning Map which defined and described details of construction and the boundaries of said airport. [fol. 1422] The airport so described encompassed an area of approximately one square mile. It was located in an area bounded generally by industrial plants on the north, and on the south by the Grand Calumet River, beyond which were the Lake Shore Railroad, the utility lines of the Northern Indiana Public Service Company, and a residential area.

The ordinance was enacted pursuant to the authority as authorized by Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 169, § 6, p. 252 [being § 14-422, Burns' 1950 Repl.]. The provision therein which is directly related to this litigation, presumed to invest the City of Gary with jurisdiction over structures for six miles in all directions radiating from said airport, and to provide that no structure should be erected within the inner area approach zone to any proposed runway for a distance extending 6,000 feet from the end of the proposed runway to any height which would interfere with the glide angle therefrom of 40 feet horizontally to each one foot of vertical height. The ordinance further provided for the granting of non-conforming uses and variances, upon showing of good and sufficient reasons, before the Board of Zoning Appeals in the City of Gary under its rules and regulations.

Pursuant to said ordinance and in conformity with the details of construction described in said Gary Airport Zoning Map, three runways were constructed, except that approximately 300 feet was omitted from the south end of the north and south runway, which runway is involved in this action.

On or about March 23, 1950, appellees entered into a 20 year lease for the operation of said airport. Pursuant to said lease, appellees expended approximately $400,000 in the building of hangars, the purchase of equipment and facilities for the operation of the general business of said airport.

[fol. 1423] Thereafter the appellant located and constructed its toll road, parallel with the south side of the Gary Municipal Airport in such manner as to cross the inner area approach zone of the north-south runway as

prescribed by the ordinance, the road being approximately 743 feet south of the south end of said proposed runway, and approximately 25 feet higher than the elevation of the end of said proposed runway.

Under the ordinance the permitted elevation of structures at the location of the toll road was approximately 18½ feet, the toll road thus projecting itself into the prohibited area about 6½ feet. It is this encroachment by appellants upon the approach zones to the airport, as fixed by the ordinance, that appellees based their action for damages.

Three basic issues are raised by appellants to appellees' right to recover damages by reason of appellant's noncompliance with the ordinance: (1) Does the ordinance rest upon any valid legislative authority; (2) does the ordinance purport to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States; and (3) if the ordinance does not effect an unconstitutional taking of private property for public use, but merely operates as a limitation upon the use of private property by a municipality, within the valid exercise of the police power, may that limitation of use be divested without compensation by an agency of the state which is subsequently granted authority to occupy land and air space upon which there had previously been placed a limitation as to its use?

Because of the decision which we have reached in this case, it is necessary that we consider only appellant's [fol. 1424] second contention, namely, that the provisions of the ordinance relied upon by appellees was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant constructed its toll road.

This reason for the invalidity of the ordinance was urged by appellant in its objection to the admissibility of the ordinance and the maps or plans offered by appellees as a part thereof. The same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled.

The fact that private property may not be taken for public use without compensation is not debatable.[1] However, in determining whether this constitutional protection has been violated by the ordinance under consideration, two main issues arise: (1) Whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking.

With respect to the first issue, the law has been made clear by both legislative and judicial declaration that a landowner is also the owner of the air space above his property, at least to the extent that such air space may reasonably be used by him. The Indiana Legislature has [fol. 1425] provided that:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, . . . " Acts 1927, ch. 43, § 3, p. 119 [being § 14-103, Burns' 1956 Repl.].

Also, the property right of a landowner in the air space above his property was recognized in numerous decisions of this court and the federal courts. In *Capitol Airways, Inc.* v. *Indianapolis P. & L. Co.* (1938), 215 Ind. 462, 466, 18 N.E. 2d 776, 778, suit had been brought by an airport operator, who admittedly had no right to take property by eminent domain against a public utility, for damages

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[1] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Article 1, § 21 Indiana Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amend. Constitution of the United States. Pennsylvania Coal Co. v. Mahon (1922), 260 U. S. 393, 67 L. Ed. 322, 43 S. Ct. 158; General Outdoor Advertising Co. v. City of Indianapolis (1930), 202 Ind. 85, 172 N. E. 309.

and an injunction. The wrongful act complained of was the erection of a power line by the public utility which, it was claimed, obstructed the flight of airplanes into and out of the airport. This court affirmed the sustaining of a demurrer to the complaint and stated:

> "The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. . . . "

The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath. In *U. S.* v. *Causby* (1946), 328 U. S. 256, 264, 90 L. Ed. 1206, 66 S. Ct. 1062, the problem [fol. 1426] presented was whether property was taken, within the meaning of the Fifth Amendment to the Constitution of the United States, by frequent and regular flights of military aircraft over the claimant's land at low altitudes. The court held there had been a taking of an easement over the property for which compensation had to be paid, and stated:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."

For an excellent analysis of the problem, see *Ackerman* v. *Port of Seattle;* amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958).

The *Causby* case, *supra,* was reaffirmed by the Supreme Court of the United States on March 5, 1962, in *Griggs* v. *Allegheny County,* 369 U. S. 84, 90, 7 L. ed. 2d 585, 589,

82 S. Ct. 531, reh. den. 369 U. S. 857, 8 L. ed. 2d 16, 82 S. Ct. 931, involving frequent low landings and take-offs over the residence of the petitioner. The Supreme Court held that there had been a taking of property in violation of the Fourteenth Amendment. The reasoning of the court was expressed as follows:

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C.A.A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface [fol. 1427] right of way is [sic] for operation of a bridge, or as is the land necessary for the operation of a dam. See United States v. Virginia Electric & Power Co., 365 US 624, 630, 5 L ed 2d 838, 845, 81 S Ct 784. As stated by the Supreme Court of Washington in Ackerman v. Seattle, 55 Wash 2d 401, 413, 348 P2d 664, 671, 77 ALR2d 1344, ' . . . an adequate approach way is as necessary a part of an airport as is the ground on which the airport itself is constructed. . . . ' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

In the light of the above authorities we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

The next problem is whether an unconstitutional taking has resulted in the instant case. In considering this point the distinction must be made between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid. In the former instance, where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation. A common example of such an authorized restriction is the imposition on property of building set-back lines. *Gorieb* v. *Fox* (1927), 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675; *Bd. of Zoning Ap. of Decatur* v. *Jehovah's Witnesses* (1954), 233 Ind. 83, 117 N.E. 2d 115; *Goldsmith* v. *City of Indianapolis* (1935), 208 Ind. 465, 196 N. E. 525.

However, mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use. The latter can be effected only if compensation is provided. *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 67 L. Ed. 322, 43 S. Ct. 158; 1 Metzenbaum, Law of Zoning 70-76 (2d ed. 1955); *Griggs* v. *Allegheny, supra.*

[fol. 1428] With this distinction established, it becomes apparent that the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation.

True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114; 1 Metzenbaum, op. cit. *supra* at 708. An unconstitutional law cannot be made constitutional by merely providing a procedure which gives a complaining

party the right of judicial review. *Finney* v. *Johnson* (1962), 242 Ind. 465, 179 N.E. 2d 718.

Our attention has been called to the fact that the preamble of the ordinance shows that its purpose is to exercise the right of eminent domain under the guise of the police power.[2] However, as has been stated:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, . . . is a palpable [fol. 1429] invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constition."

Mugler v. *Kansas* (1887), 123 U. S. 623, 661, 31 L. Ed. 205, 8 S. Ct. 273; see also 1 Metzenbaum, *op. cit. supra* at 77-79.

The issue before us was considered by the Supreme Court of New Jersey in the case of *Yara Engineering Corp.* v. *Newark* (1945), 132 N.J.L. 370, 373, 40 A. 2d 559, 561. The City of Newark had adopted an airport zoning ordinance creating airport approaches and turning zones in the vicinity of the Newark Municipal Airport and regulating and restricting the height of structures in these zones. A proceeding was brought to set aside the ordinance. In holding the ordinance unconstitutional, the Supreme Court of New Jersey stated:

> "We conclude that this ordinance . . . is in fact the taking of private property without due process of law, in violation of the Fourteenth Amendment of the

---

[2] "WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power. . . ." Gary Ordinance No. 2897 [dated Sept. 19, 1949].

United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the State Constitution.

"The City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. . . . "

See also cases cited at Anno. 77 A.L.R. 2d 1362.

The federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation. This is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S.D.N.Y. 1956), 144 F. Supp. 258, and *United States* v. *4.43 Acres of Land* (N.D. Tex. 1956), 137 F. Supp. 567, for air easements over property adjoining federal bases.

On the basis of the above authorities, we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

[fol. 1430] Appellee finally asserts that even though the ordinance unlawfully may have effected a taking of the land subsequently acquired by the toll road without compensation, it was the duty of "any immediate property owner" to protect himself by inverse condemnation proceedings under authority provided in the Eminent Domain Statute, citing §§ 3-1706-3-1711, Burns' 1946 Repl., and that they having failed to do so, their rights must be considered waived.

Appellees' position is not tenable for two reasons: The statute providing for inverse condemnation proceedings presumes (1) that the taking was an accomplished fact, and (2) that it took place under some constitutional authority, with respect to which, however, the prescribed procedure had not been followed. In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which

are adjacent to, parallel with, are much higher than the toll road complained of. Furthermore, as heretofore discussed, the ordinance, upon which appellees' alleged property right is based, was wholly void insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is wholly void then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Judgment is reversed and the trial court is directed to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence.

Myers, C.J., Arterburn & Landis, JJ. concur.
Jackson, J. dissents [without opinion].

[fol. 1431]

IN THE SUPREME COURT OF INDIANA

ORDER DENYING REHEARING—December 17, 1963

Rehearing Denied.

December 17, 1963.

Jackson, J., dissents.

Frederick Landis, Chief Justice.

[fol. 1432]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1963

NICK JANKOVICH and PAUL JANKOVICH, Co-Partners, d/b/a CALUMET AVIATION COMPANY, Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 28, 1964

Upon Consideration of the application of counsel for petition(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of February, 1964.

[fol. 1433]

SUPREME COURT OF THE UNITED STATES

No. 1000—October Term, 1963

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, doing business as CALUMET AVIATION COMPANY, Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION.

ORDER ALLOWING CERTIORARI—May 25, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APR 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Nick Jankovich and Paul Jankovich, co-partners, doing business as Calumet Aviation Company, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled case on October 24, 1963.

OPINION BELOW

The opinion of the Supreme Court of Indiana, Judge Jackson dissenting, is reported at 193 N.E. 2d 237 (*infra*, p. 1a). No opinion was written by the Porter Circuit Court, Lake County, Indiana.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on October 24, 1963 (*infra*, p. 10a).[1] Its order denying rehearing was entered on December 17, 1963. An order was entered on February 28, 1964 by Mr. Justice Tom C. Clark extending the time for filing a petition for a writ of certiorari to April 15, 1964. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra*, pp. 27-30.

QUESTION PRESENTED

Whether a municipal ordinance which zones property adjacent to a public airport for the purpose of maintaining safe and unobstructed approaches to the airport constitutes a valid exercise of the police power or is a taking of property without compensation in violation of the Fourteenth Amendment of the United States Constitution.

STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949, is entitled: "An ordinance regulating and restricting the height of structures, and otherwise regulating the use of property in the vicinity of the Gary Municipal Airport by creating airport approach and turning zones and establishing the boundaries thereof; defining certain terms used therein; providing for appeals therefrom; and imposing penalties for violation thereof." The ordinance is summar-

[1] The practice of the Indiana Supreme Court is not to render a judgment separate from the opinion. The directions contained at the conclusion of the opinion constitute the judgment. The directions are executed by the lower court upon certification to it of the opinion.

ized in pertinent part in the Statement, *infra*, pp. 4-6, and is set out in full in Appendix B, *infra*, pp. 11a-17a. The Federal Airport Act, as amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101) is set out in pertinent part in Appendix C, *infra*, pp. 18a-23a. The Indiana Tall Structures Act (5 Burns Ind. Stat. 140-327 *et seq.*, 1963 Cum. Supp.) is set out in full in Appendix D, *infra*, pp. 24a-30a. The provision of the Indiana enabling statute pertaining to the adoption of airport zoning by a municipality (5 Burns Ind. Stat. 14-442) is set out in full in Appendix E, *infra*, pp. 30a-32a.

STATEMENT

In October 1939, the City of Gary, Indiana, enacted an ordinance declaring that it needs and shall acquire, improve, operate, and maintain an airport (Pl. ex. 1, R. 398). On May 29, 1947, the United States granted land to Gary "for and in consideration of the development and operation of the . . . demised premises as a public airport in perpetuity . . . and for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport . . ." (Pl. ex. 2, p. 1, R. 399). Automatic reversion of the title to the United States was provided "if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time . . ., or that after having been so developed the premises have ceased to be used or are necessary for airport purposes" (Pl. ex. 2, p. 2, R. 399). Gary promised that "such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination" (*ibid.*).

The demised land encompassed an area of approximately one square mile bounded on the south side by the Grand Calumet River (*infra*, p. 2a). The master plan of the airport called for the construction of three runways on this land, an east-west runway, a northwest-southeast runway, and a north-south runway (Pl. ex. 10, R. 634). The east-west runway has not been constructed (R. 619-620). The northwest-southeast runway, planned for a length of 6,000 feet and a width of 150 feet. has been constructed to a length of 4600 feet and a width of 100 feet (R. 620). The north-south runway, immediately involved in this proceeding, is planned for length of 3900 feet and a width of 150 feet (*ibid.*). It has been constructed to a length of 3600 feet and a width of 100 feet; its original length just prior to 1950 was 3100 feet, which was extended in 1954 or 1955 by 300 feet on the north end and 200 feet on the south end, leaving 300 unconstructed feet at the south end (R. 512, 541-542, 620, 662, 691, 695-696, 703). Federal and municipal funds were expended for this airport construction (R. 526, 622, Def. ex. P, p. 2, R. 1112).[2]

In September 1949, before the inception of airport construction, the City of Gary enacted an airport zoning ordinance to regulate and restrict the height of structures and the use of property in the vicinity of the airport (Pl. ex. 3; R. 634, *infra*, pp. 11a-17a).

---

[2] The Grant Agreement of June 1949 between the City of Gary and the Civil Aeronautics Administration shows that the United States obligated itself in the sum of $166,000 as its contribution to the construction of the airport (*infra*, p. 34a). Not in evidence, the Grant Agreement has been obtained from the Federal Aviation Agency, and relevant parts of it are excerpted in Appendix F, *infra*, pp. 33a-41a. Further Grant Agreements were entered into on May 22, 1950, June 28, 1951, and August 12, 1957.

As presently pertinent the operative part of the ordinance provides that (Pl. ex. 3, p. 3, *infra*, pp. 13a-14a):

> Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:
>
> (a) Turning Zone, 150 feet
>
> (b) Outer Area Approach Zone, 150 feet
>
> (c) *Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope.* [Emphasis supplied.]
>
> (d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet
>
> All height limits shall begin at elevation of 590 feet above sea level.

The "40 to 1 slope" required by Section 4(c) of the ordinance pertains to "glide angle" or "glide slope". Glide angle or slope is determined as the ratio of horizontal distance to vertical elevation. A 40 to 1 glide angle or slope means 40 feet of forward horizontal distance for one foot of vertical elevation. (R. 681-682).

Made part of the ordinance was a detailed zoning map and layout plan (Pl. ex. 3, pp. 2-3, *infra*, p. 13a). Exempt from the ordinance was any existing structure and any structure whose construction or alteration had been begun and could with diligence be completed in

two years (*Id.*, p. 3, *infra*, p. 14a). Provision for variance was made if compliance with the ordinance "would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance" (*Id.*, pp. 3-4, *infra*, p. 14a). A detailed hearing procedure was prescribed (*Id.*, pp. 4-5, *infra*, pp. 14a-16a).

The preamble to the ordinance stated that "airport hazards endangered the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investments therein . . ." (Pl. ex. 3, p. 1, *infra*, p. 11a). To overcome these hazards, the preamble stated, the Board of Aviation Commissioners of the City of Gary has "adopted certain standards for the safe descent, landing and ascent of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land . . ." (*ibid.*). Accordingly, the preamble concluded, enactment of the ordinance "is necessary in the interest of the public health, public safety, and general welfare," to the end that "creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power . . ." (*ibid.*).

On March 20, 1950, subsequent to enactment of the ordinance, petitioners entered into a 20 year lease, with an option for an additional 10 year period, to operate the airport (Pl. ex. 4, R. 570). Pursuant to that lease, petitioners expended about $400,000 to build hangars

and purchase equipment and facilities for the operation of the general business of the airport (*infra*, pp. 2a-3a).

This was the situation which prevailed when respondent Indiana Toll Road Commission came on the scene. It constructed a toll road in an east-west direction parallel with the south side of the Gary Municipal Airport approximately at right angles to the north-south runway (*infra*, p. 3a, Def. ex. A, R. 917). The Commission acquired the right-of-way in 1954 and 1955 (R. 589, 661). It completed construction and opened the road for traffic in 1956 (*ibid.*). The road was constructed along the south boundary of the airport (R. 476). The road was raised about 30 feet above the surface of the land on which it was built (Pl. ex. 15, def. ex. A). It was constructed partly on the river bed of the Grand Calumet River; the toll road shifted the river bed north a distance varying from 100 to 175 feet; it brought the north line of the river bed 175 feet closer to the south line of the airport property, approximately the width of the river (R. 594-596, pl. exs. 15, 16). The north edge of the road is 1,043 feet south of the existing south end of the north-south runway (or 743 feet from the south end of the proposed but not yet constructed length of the runway), and is elevated 24.6 feet higher than the south end of the north-south runway (Def. ex. A, R. 917, *infra*, p. 3a). Under the ordinance the permitted elevation of structures at the location of the road was about 18½ feet, with the result that the road penetrated about 6½ feet into the air space protected by the ordinance (*infra*, p. 3a). The consequence of this encroachment was to reduce the glide slope from about 38 to 1 to about 27 to 1, causing the north-south runway to be unusable for aircraft grossing 15,000 pounds or more (R. 671-701, 546-550, 556-557, 645-651, 655).

To secure relief from the harm caused by the impaired use of the north-south runway, petitioners sued in the Porter Circuit Court, Lake County, Indiana, for injunctive relief and damages (R. 5-16). In defense, at the *nisi prius* level, respondent first took the position that the zoning ordinance "was, as a matter of law, an act done in the exercise of said City's police power"; that it "constituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States"; but that respondent's own action as a "body politic" constituted a supervening exercise of "its politic power" (R. 46-47). Upon rejection of this argument by the Circuit Court (R. 49), respondent switched its position to an attack upon the validity of the zoning ordinance, claiming that it caused an "unconstitutional taking of property without payment of due compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana" (R. 622). Rejecting this argument, the Circuit Court ruled that (R. 634):

> With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that which immediately rests . . . without the physical boundaries of the airport as established under the statute of 1945.

After trial, while denying injunctive relief, the Circuit Court awarded petitioners a judgment "in the sum of $164,000.00 and costs" (R. 244).

On appeal to the Indiana Supreme Court, that court held that the zoning ordinance was "wholly void . . ." (*infra*, p. 10a). Citing this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, it held that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (*infra*, pp. 5a-7a). Citing this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, it held that "the taking or appropriating of private property by the government for a specific public use . . . can be effected only if compensation is provided" (*infra*, p. 7a). Citing this Court's decision in *Village of Euclid* v. *Ambler*, 272 U.S. 365, it held that respondent was under no initial obligation to seek a variance, for no "exhaustion of administrative remedies" is required "when a zoning ordinance is invalid as an entirety" (*infra*, p. 8a). And, citing this Court's opinion in *Mugler* v. *Kansas*, 123 U.S. 623, it held that it was free to look through the declaration of policy in the ordinance and treat it as an artifice (*infra*, pp. 8a-9a). It therefore invalidated the ordinance on the sole and exclusive ground that it "was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant [respondent here] constructed its toll road" (*infra*, p. 4a).

REASONS FOR GRANTING THE WRIT

Based on the premise that the usable air space above land is property which cannot be taken without compensation, the court below nullifies the airport zoning ordinance on its face, unrelated to any claim or finding of specific arbitrary application, concluding that it is a "wholly void" enactment "invalid as an entirety"

(*infra*, pp. 10a, 8a). The central question therefore is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. On the constitutional level the question calls for reconciliation in a contemporary setting of the ancient tension between the police power and eminent domain. *Mugler* v. *Kansas*, 123 U.S. 623, 668, 669. On the practical level the import of the question is immense. "The protection of airport approaches from dangerous obstruction offers one of the most pressing of current legal problems" Rhyne, Airports and the Courts, 164 (1944). "In the field of airport law the most important questions confronting the lawyer today—and probably the most difficult—are those arising out of the conflict which almost inevitably exists between the interests of the owner or occupant of land in the immediate vicinity of an airport and those of the airport owner. . . . Can the airport owner, by court action or the adoption of airport zoning regulations, prevent the landowner from erecting a structure which would be an obstruction to the landing and taking-off of aircraft at the airport, or from using his property in a manner hazardous to such aircraft operations?" Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539 (1946).

I

The dimensions of the constitutional question can be quickly sketched. It is of course datum that "'an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip itself, is

constructed. . . .' Without the 'approach areas,' an airport is indeed not operable." *Griggs* v. *Alleghany County*, 369 U.S. 84, 90. Zoning the property adjacent to the airport to maintain unobstructed approaches fulfills the need of preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413. The point at which diminution reaches a magnitude constituting a taking is a question of degree. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168. "There is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594.

But to say that the question is one of degree does not mean that it is wholly at large. Zoning is indispensable in our crowded society as a means of adjusting conflicting property and community demands. Space, height, and use limitations are commonplace and their validity unquestionable (*Gorieb* v. *Fox*, 274 U.S. 603, 608):

> It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have

> arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. . . . State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Airport zoning is in principle no different. The problem of approach protection to which airport zoning is directed has been summarized as follows (Rhyne, Municipal Law, 489 (1957)):

> To protect the public interest in public airports by preventing construction or growth of hazards or obstructions in the approach zones of properly located and constructed airports, municipal, state and federal governments have turned to police power zoning to limit the height of structures and objects of natural growth in airport approach zones. A municipality may spend large sums from public funds for the very essential public purpose of constructing and maintaining an adequate and safe airport to serve its residents, only to have this airport rendered worthless almost overnight by the erection or growth of some obstruction in the airport's approach zones which prevents full use of the landing facilities there made available at public expense.

The House Committee on Interstate and Foreign Commerce has warned that: "Hundreds of millions of dollars are being spent on airports. But unless an airport can be approached without encountering obstructions

the investment therein becomes valueless—or the airport itself becomes a death trap. To protect passengers and flight crews, and to assure that airports can be used in connection with defense of the Nation in time of emergency, it is vital that there be adequate zoning. Unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety." H. Rep. No. 784, 78th Cong., 1st sess., 11.[3]

Responsive to these considerations, the Florida Supreme Court, in emphatic conflict with the court below, has endorsed airport zoning as a valid exercise of the police power. *Harrell's Candy Kitchen, Inc.* v. *Sarasoto-Manatee Airport Authority,* 111 So. 2d 439 (Fla. 1959). "We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations promote the general welfare of the state and community served, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use facilities in taking off and landing as well as those living in the vicinity thereof. Well settled principles with respect to zoning apply equally to airport zoning." *Id.* at 443.[4] Informed commenta-

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[3] See also, Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946); 2 Yokley, Zoning Law and Practice, 43-45, 61-75 (1953).

[4] Cases pro and con, whether by holding, dictum, or implication, are in general not illuminating, and are collected in Rhyne, Municipal Law, 490 (1957), and Anno., 77 A.L.R. 2d 1355, 1362-64.

tors have likewise uniformly held the view that reasonable airport zoning is valid.[5]

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of police power, the question reduces to whether the ordinance in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (*infra*, p. 10a). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. A full hearing procedure is established. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. And it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of the adjacent property.

Invalidation of the ordinance thus rests on the bare claim that ownership of the property of itself precludes zoning to regulate its use. It is that claim which the court below sustains. According to it, "'Had the . . . [adjacent property owner] chosen to

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[5] Rhyne, Municipal Law, 491 (1957); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 554 (1946); Rhyne, Airports and the Courts, 164-190 (1944); Note, *Zoning—The Airport And The Land Surrounding It In The Jet Age*, 48 Ky. L.J. 273 (1960); Manion, Law of the Air, 77 (1950).

erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (*infra*, p. 5a). But that doctrine can hardly survive its statement. "Ownership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506. The essence of civilized society is adjustment of competing demands in use of land and other valuables. The absolutism of the court below is atavistic, *Ferguson* v. *Skrupa*, 372 U.S. 726, and requires this Court's intercession to maintain governmental viability in the important area of airport zoning. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 303.

II

The question has national importance. The ordinance in this case is typical of many throughout the country. Adoption of airport zoning ordinances has been impelled by federal authority in furtherance of national aviation policy. Only last month, on March 11, 1964, Congress amended the Federal Airport Act explicity to confirm "adoption of zoning laws" as a central element of federal aviation policy (*infra*, pp. 18-19).

The origin of airport zoning, its widespread incidence, and the union of municipal, state, and federal authority to further it has been described as follows (Rhyne, Municipal Law, 489, 490-491 (1957)):

> The first suggestion that zoning should be the answer to the problem of airport approach protection came in 1928 when Alameda County, California adopted an ordinance prohibiting the erection or maintaining of any "structure or obstruction to the operation of aircraft, at a height in

excess of fifty (50) feet upon unincorporated territory . . . within one thousand (1,000) feet of any boundary of a public air navigation facility . . . within the County of Alameda." In 1929, the Board of Port Commissioners of the City of Oakland, California, adopted a similar ordinance. The federal government through the Civil Aeronautics Authority, as early as 1930 and again in 1938 recognized that airport zoning was the "simplest solution . . . and therefore the most satisfactory way that can be adopted . . . to prevent obstructions in the approaches of airports." The Civil Aeronautics Administration has an established policy of inserting in all grant agreements with cities for expenditure of federal funds on public airports the requirement that the city will prevent obstructions, if possible and within its powers, by zoning, acquisition of property interests, or otherwise.

* * *

A recent review of state airport legislation reveals that airport zoning acts of one type or another have been adopted in all but eight states. These acts are usually denominated Airport Zoning Acts or Municipal Airport Approach Protection Acts and provide for the promulgation and administration of airport approach zoning regulations by subordinate units of government. Many cities have adopted airport zoning ordinances pursuant to the statutes, and the ordinances are apparently working well. Most of the enabling acts have been written or amended so as to be substantially similar to the 1944 model act formulated by NIMLO [National Institute of Municipal Law Officers] and the Civil Aeronautics Administration.[6]

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[6] For a tracing and summary of some prominent ordinances, see Rhyne, Airports and the Courts, 173-176 (1944). See also, Note, *Zoning—The Airport And The Land Surrounding It in The Jet Age*, 48 Ky. L.J. 273, 279 (1960).

Illustrating the contemporary significance of airport zoning, public hearings were resumed on February 13, 1964, by the Illinois Department of Aeronautics "concerning the establishment of Airport Zoning Regulations for Chicago-O'Hare International Airport, Chicago, Illinois,"[7] the nation's busiest airport.[8]

The federal interest in airport approach protection expressed in the Federal Airport Act is at the heart of airport zoning. "Aircraft when taking off or landing . . . need space at the ends of the landing strips, known as 'approach areas,' over which they may safely gain or lose altitude."[9] The airport approach standards incorporated in zoning ordinances to fulfill this need are based directly on federal criteria promulgated by the Federal Aviation Agency. The FAA's authority in the field of airport approach protection derives primarily from the Federal Airport Act and the role ascribed by Congress to the FAA Administrator to propose and annually revise "a national plan for the development of public airports in the United States . . ." (§ 3). "In order to bring about, in conformity with the national airport plan . . . . the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics . . ." (§ 4). Congress adopted a grant-in-aid program under which adherence to federal standards is made the condition of the grant of funds. The Act defines as an "Airport hazard" "any structure or object of natural growth located on or in the vicinity

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[7] Notice, State of Illinois, Department of Aeronautics, February 3, 1964.

[8] FAA Air Traffic Activity, Calendar 1962, 35.

[9] FAA, Small Airports, 9 (1959).

of a public airport, or any use of land near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft" (§ 2(4)). A "sponsor" in submitting a "project application" for a grant of funds for airport development is required to formulate his proposal "in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, *and safety of approaches*" (§ 9, emphasis supplied). More particularly, as a "condition precedent" to approval of the project, "the Administrator shall receive assurances in writing, satisfactory to him," that *inter alia* (§ 11(3)):

> the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards *and by preventing the establishment or creation of future airport hazards.* [Emphasis supplied.]

And, crucially significant, Congress only last month, on March 11, 1964, made explicit the especial appropriateness of zoning as one means to prevent establishment or creation of airport hazards. Thus, Congress added a new paragraph (4) to section 11 of the Act requiring that the Administrator obtain from the sponsor written assurance that:[10]

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent

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[10] Public Law 88-280, § 10, March 11, 1964; H. Conf. Rep. No. 1154, 88th Cong., 2d Sess., in 110 Daily Cong. Rec. 3519 (Feb. 26, 1964); S. Rep. No. 446, 88th Cong., 1st Sess., 2, 3, 20-25; H. Rep. No. 1002, 88th Cong., 1st Sess., 2, 6, 15.

> reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

Specific advertence by Congress to "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-standing practice. The airport approach standards, measuring the air space in the vicinity of the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the FAA in Technical Standard Order No. N18 (TSO-N18), dated April 26, 1950, as amended, entitled "Criteria For Determining Obstructions To Air Navigation." To secure adherence to these prescribed approach standards the "adoption and enforcement of zoning regulations" is one of the means specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe (Form FAA-1624, Part III 7, Sponsor Assurances):

> Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace *or by the adoption and enforcement of zoning regulations*, prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended. [Emphasis supplied.]

Furthermore, the FAA authors a Model Airport Zoning Ordinance. In the foreword to the model ordi-

nance, the FAA notes that attached to it is "a copy of Technical Standard Order-N18, which sets forth criteria for determining obstructions to air navigation." It further observes that, in establishing and defining by ordinance the "various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft", the "size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18." And it advises that its personnel is available to guide in the application of the standards:

> The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

Even with respect to the "runway clear zone," described as "the innermost part of the runway approach area" (14 CFR § 151.9(b)), zoning in lieu of a property interest may be relied upon in the case of "existing airports where improvements are made to runways or landing strips" (*id.* § 151.11(d)) or "where substantial improvements are made that do not benefit a specific runway or landing strip" (*id.* § 151.11(e)), the applicable FAA regulation stating that (*id.* § 151.11(f)):

> If a sponsor or other public agency shows that it is legally able to prevent the future erection or creation of obstructions in the runway clear zone area, and adopts protective measures to prohibit their future erection or creation, that showing is acceptable for the purposes of paragraphs (d) and (e) of this section in place of an adequate property interest. . . . In each case, the sponsor must

> furnish information as to the specific height limitations established and as to the current and foreseeable future use of the property to which they apply. The information must include an acceptable legal opinion of the validity of the measures adopted, including a conclusion that the height limitations are not unreasonable in view of current and foreseeable future use of the property, and are a reasonable exercise of the police power, together with the reasons or basis supporting the opinion.

Congressional confirmation and FAA practice are rooted in studies advocating airport zoning to protect aerial approaches. In the pioneer study in 1930, the United States Department of Commerce, Aeronautics Branch, recommended that "municipalities and other political subdivisions . . . exercise the police power in the promulgation of properly coordinated zoning ordinances applying equitably to public airports and intermediate landing fields and to commercial airports of the public utility class, as well as other land uses."[11] The so-called "Doolittle Report" to the President in 1952 made "two suggestions" pertaining to aerial approaches: "(1) that certain extensions or over-run areas be incorporated in the airport itself, and (2) that larger areas beyond such extensions be zoned by proper authority, not only to prevent the erection of obstructions that might be harmful to aircraft, but also to control the erection of public and residential buildings as a protection from nuisance and hazard to people on the ground."[12]

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[11] Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, p. 9.

[12] Report of the President's Airport Commission, The Airport and Its Neighbors, 7 (May 16, 1952).

Finally, airport zoning serves the twofold purpose of maximizing safety and protecting investment. "The maintenance of an adequate airport system is the single most important factor in insuring air safety. The importance of adequate airport facilities was cogently demonstrated in testimony presented by the Federal Aviation Agency. The agency, in urging continuation of the program, observed that more than two-thirds of all aircraft accidents occur either at or within 5 miles of the airport." S. Rep. No. 446, 88th Cong., 1st Sess., 19.[13] As to investment, "Since the federal aid to airport program was first initiated in fiscal year 1947, total expenditures have amounted to $550,609,855." *Id.* at 7. Estimated cost of further development over the next five years is $1,082,439,000 of public funds,[14] with the federal grant-in-aid program providing for $225,000,000 over the next three years.[15] The factors of safety and investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens." *Id.* at 17.

The situation of the Gary Municipal Airport in this case fits the federal pattern precisely. It is one of the airports which make up the National Airport Plan;

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[13] See also, Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st sess., 29, 184; Statistical Review and Resume of Accidents, US Air Carriers, Calendar Year 1960, CAB 1963, 12.

[14] National Airport Plan, Requirements for Fiscal Years 1963-1967, 1963 Supplement, FAA, Ex. 1, p. 75 (March 1963).

[15] Public Law 88-280, § 4, March 11, 1964.

it serves the communities of Gary, Hammond, and East Chicago; and improvements in it to meet civil aviation needs for fiscal years 1963-1967 are considered necessary by the National Airport Plan.[16] The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to that end (*infra*, pp. 41a-42a):

> Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either *by the adoption and enforcement of a zoning ordinance and regulations* or by the acquisition of easements or other interests in lands or airspace, or by both such methods. . . . The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946 unless otherwise authorized by the Administrator. [Emphasis supplied.][17]

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[16] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 101 (April 1962).

[17] Office of Airports Drawing No. 672 was superseded by Office of Airports Drawing No. 814, the latter being incorporated in the presently effective Technical Standard Order N18 as the schematic representation of the obstruction criteria. The Grant Agreement

The zoning ordinance which Gary adopted in September 1950 was tailored from the then current model ordinance which the Civil Aeronautics Commission had authored in February 1947. And the federal interest is particularly apparent in that the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport", with automatic reversion of the title to the United States if the FAA Administrator determines that "the premises have ceased to be used or are necessary for airport purposes" (*supra*, p. 3).

The court below thus clearly misapprehends the federal scheme when it states that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (*infra*, p. 9a). The federal scheme is indeed based on the contrary view and the decision below is wholly incompatible with it in totally nullifying airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. Equally wrong is reliance by the court below upon this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, for the conclusion that airport zoning, without more, constitutes a taking (*infra*, pp. 5a-7a). *Causby* and *Griggs* hold that low flights at frequent

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between the City of Gary and the Civil Aeronautics Administration of June 19, 1951, states in paragraph 8(b) that "The Airport Approach Standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 814 dated April 26, 1950 unless (otherwise) authorized by the Administrator".

intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. The decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. It is this question of first impression which requires this Court's review.

III

Independently of its national significance, the question is important even limiting the impact of the decision below to Indiana, for it nullifies a state-wide policy of airport zoning. There are 63 airports in Indiana included within the National Airport Plan.[15] In 1957 Indiana enacted a statute known colloquially as the Tall Structure Act and formally entitled "An act to promote safety, welfare and protection of persons and property in the air and on the ground by regulating the height, location and visual identification characteristics of certain structures." 5 Burns Ind. Stat. 14-327 *et seq.* The Act is designed to apply only where no existing airport zoning already obtains, for it is "not [to] apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law. . . ." *Id.* 14-339. The policy underlying this void-filling statute is expressed as follows: "The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic

[15] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 99-102 (April 1962); *Id.*, 1963 Supplement, 38-39 (March 1963).

communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land related thereto, is regulated." *Id.* 14-327. The scheme of regulation is to prohibit the erection of structures which exceed specified height limitations unless a permit is obtained (*id.* 14-329); to prohibit the issuance of a permit if certain defined height limitations are exceeded (*id.* 14-330); and, within permissible height limitations, to base the issuance of a permit upon a determination by the Indiana Aeronautics Commission of "a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors." (*id.* 14-333).

The scheme of regulation encased in the Indiana Tall Structure Act is in principle no different from the Gary ordinance. The decision below nullifies the Gary ordinance, every other existing municipal airport zoning ordinance in Indiana, and the Tall Structures Act designed to operate in localities in Indiana where airport zoning has not been enacted. State-wide paralysis of governmental viability within the vital field of airport zoning presents a situation requiring this Court's review.

IV

The decision below does not rest upon a "'non-federal ground. . . independent of the federal ground and adequate to support the judgment.'" *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281. While respondent contended that the ordinance violated both the state and federal constitutions (*infra*, p. 3a), and the court below quoted the relevant provisions of both in a footnote in its opinion (*infra*, p. 4a, n. 1), at every critical juncture of its analysis the court below invoked and quoted this Court's decisions as the foundation of its reasoning (*supra*, p. 9.), and at no stage did it specify the state constitution as the grounding for its ultimate conclusion that "the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation" (*infra*, p. 10a). The federal source of law underpinning the decision below is especially denoted by its prominent reliance on *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Alleghany County*, 369 U.S. 84 (*infra*, pp. 5a-7a). *Causby* and *Griggs* importantly construed the Civil Aeronautics Act, the Federal Airport Act, and federal regulations. And the inherently federal character of any question of the constitutionality of airport zoning is further apparent from the fact that full account of federal aviation policy is essential to its informed determination.

It was thus by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. Without the influence of necessary obedience to this Court's views, there is no saying that the court below would have arrived at the result it did. For it would be pointless for it to conclude

that the ordinance was valid under the state constitution if it must in any event fall under the federal constitution. Since the premises for the decision below are derived from the compulsion of this Court's opinions, its federal orientation precludes ascribing to that decision an *independent* state basis. Hence, giving maximum weight to the possible existence of a state ground, it was inextricably entwined with the federal ground, and the least that must therefore be said is that the "two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law." *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 514. In that posture, "where the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irr. District* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164. See also, *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773.

If there were an existing state ground which could be deemed an independent basis of decision, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. For the consequence of a conclusion that the ordinance had been invalidated upon an independent state constitutional ground would be to bring the decision below into collision with federal aviation policy expressed in the Federal Airport Act and to require its supersession under the Supremacy Clause. "[I]t is 'familiar doctrine' that the federal policy 'may not be set at nought, or its benefits denied,' by the state law." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 32 U.S. Law Week 4206, 4207 (S. Ct. March 9, 1964). The court below faced the

relevance of federal aviation policy when it concluded, albeit erroneously, that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (*infra*, p. 9a). Respondent had indeed urged in the court below that its claim of unconstitutionality was compatible with federal aviation policy.[19] There is, therefore, no escape from the federal question. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

The short of it is that the inevitable consequence of the decision below is to restrict the means available to protect aerial approaches to acquisition by purchase or condemnation. That means is financially prohibitive. The "adoption of zoning laws" which Congress has only last month explicitly confirmed as a central element of federal aviation policy is the federally-prescribed alternative to excessive cost. As the Senate Commerce Committee stated, "the committee has no intention of allowing airports to be priced out of existence" S. Rep. No. 446, 88th Cong. 1st Sess., 24. Contrary to the federal scheme the decision below prices airports out of existence in Indiana.

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[19] Respondent's brief in the court below, p. 242. All briefs below have been certified by the clerk of the Indiana Supreme Court and lodged with the clerk of this Court.

These considerations preclude a view that there exists a state ground independent of the federal ground adequate to support the judgment.[20]

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1964

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[20] If ambiguity is nevertheless thought to exist of a gravity which this Court may not wish to resolve without summoning the aid of the court below, the appropriate course would be to grant the writ, vacate the judgment, and remand for clarification. *Minnesota* v. *National Tea Co.*, 309 U.S. 551. For decision by this Court of "important federal issues" should not go by default because of "obscurities and ambiguities" in state court opinions. *Id.* at 557. We do not invite this course, for we believe it to be unnecessary in view of the clear absence of an adequate and independent state ground. We simply present it as an alternative that the Court may desire to consider.

APPENDIX A

ATTORNEYS FOR APPELLANT:

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Of Counsel.

Filed Oct. 24, 1963

IN THE SUPREME COURT OF INDIANA

No. 30109

INDIANA TOLL ROAD COMMISSION, A Body both Corporate and Politic, *Appellant*,

v.

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, d b a Calumet Aviation Company, *Appellees*.

Appeal From the Porter Circuit Court
Alban M. Smith, Special Judge

ACHOR, *Judge*

This is an action for damages alleged to have been sustained by appellees as a result of the construction by appellant of the Indiana East-West Toll Road in violation of a Master Airport Zoning Ordinance of the City of Gary, and the contract rights of appellees as lessees of a portion of the Gary Municipal Airport. The appellees also sought to enjoin and restrain appellant from maintaining the toll road at its present elevation.

The circumstances giving rise to this litigation are as follows: The City of Gary enacted an ordinance in Sep-

tember, 1949, creating an airport commission. The ordinance further purported to incorporate, as a part thereof, the Gary Airport Zoning Map which defined and described details of construction and the boundaries of said airport. The airport so described encompassed an area of approximately one square mile. It was located in an area bounded generally by industrial plants on the north, and on the south by the Grand Calumet River, beyond which were the Lake Shore Railroad, the utility lines of the Northern Indiana Public Service Company, and a residential area.

The ordinance was enacted pursuant to the authority as authorized by Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252 [being § 14-422, Burns' 1950 Repl.]. The provision therein which is directly related to this litigation, presumed to invest the City of Gary with jurisdiction over structures for six miles in all directions radiating from said airport, and to provide that no structure should be erected within the inner area approach zone to any proposed runway for a distance extending 6,000 feet from the end of the proposed runway to any height which would interfere with the glide angle therefrom of 40 feet horizontally to each one foot of vertical height. The ordinance further provided for the granting of non-conforming uses and variances, upon showing of good and sufficient reasons, before the Board of Zoning Appeals in the City of Gary under its rules and regulations.

Pursuant to said ordinance and in conformity with the details of construction described in said Gary Airport Zoning Map, three runways were constructed, except that approximately 300 feet was omitted from the south end of the north and south runway, which runway is involved in this action.

On or about March 23, 1950, appellees entered into a 20 year lease for the operation of said airport. Pursuant to said lease, appellees expended approximately $400,000 in the building of hangars, the purchase of equipment and

facilities for the operation of the general business of said airport.

Thereafter the appellant located and constructed its toll road, parallel with the south side of the Gary Municipal Airport in such a manner as to cross the inner area approach zone of the north-south runway as prescribed by the ordinance, the road being approximately 743 feet south of the south end of said proposed runway, and approximately 25 feet higher than the elevation of the end of said proposed runway.

Under the ordinance the permitted elevation of structures at the location of the toll road was approximately 18½ feet, the toll road thus projecting itself into the prohibited area about 6½ feet. It is this encroachment by appellants upon the approach zones to the airport, as fixed by the ordinance, that appellees based their action for damages.

Three basic issues are raised by appellants to appellees' right to recover damages by reason of appellant's noncompliance with the ordinance: (1) Does the ordinance rest upon any valid legislative authority; (2) does the ordinance purport to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States; and (3) if the ordinance does not effect an unconstitutional taking of private property for public use, but merely operates as a limitation upon the use of private property by a municipality, within the valid exercise of the police power, may that limitation of use be divested without compensation by an agency of the state which is subsequently granted authority to occupy land and air space upon which there had previously been placed a limitation as to its use?

Because of the decision which we have reached in this case, it is necessary that we consider only appellant's sec-

ond contention, namely, that the provisions of the ordinance relied upon by appellees was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant constructed its toll road.

This reason for the invalidity of the ordinance was urged by appellant in its objection to the admissibility of the ordinance and the maps or plans offered by appellees as a part thereof. The same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled.

The fact that private property may not be taken for public use without compensation is not debatable.[1] However, in determining whether this constitutional protection has been violated by the ordinance under consideration, two main issues arise: (1) Whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking.

With respect to the first issue, the law has been made clear by both legislative and judicial declaration that a

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[1] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Article 1, § 21 Indiana Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amend. Constitution of the United States.

Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158;

General Outdoor Advertising Co. v. City of Indianapolis (1930), 202 Ind. 85, 172 N. E. 309.

landowner is also the owner of the air space above his property, at least to the extent that such air space may reasonably be used by him. The Indiana Legislature has provided that:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, . . . " Acts 1927, ch. 43, § 3, p. 119 [being § 14-103, Burns' 1956 Repl.].

Also, the property right of a landowner in the air space above his property was recognized in numerous decisions of this court and the federal courts. In *Capitol Airways, Inc.* v. *Indianapolis P. & L. Co.* (1938), 215 Ind. 462, 466, 18 N.E. 2d 776, 778, suit had been brought by an airport operator, who admittedly had no right to take property by eminent domain against a public utility, for damages and an injunction. The wrongful act complained of was the erection of a power line by the public utility which, it was claimed, obstructed the flight of airplanes into and out of the airport. This court affirmed the sustaining of a demurrer to the complaint and stated:

> "The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. . . . "

The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath. In *U. S.* v. *Causby* (1946), 328 U. S. 256, 264, 90 L. Ed. 1206, 66 S. Ct. 1062, the problem presented was whether property was taken, within the meaning of the Fifth Amendment to the Constitution of

the United States, by frequent and regular flights of military aircraft over the claimant's land at low altitudes. The court held there had been a taking of an easement over the property for which compensation had to be paid, and stated:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."

For an excellent analysis of the problem, see *Ackerman* v. *Port of Seattle*; amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958).

The *Causby* case, *supra*, was reaffirmed by the Supreme Court of the United States on March 5, 1962, in *Griggs* v. *Allegheny County*, 369 U. S. 84, 90, 7 L. ed. 2d 585, 589, 82 S. Ct. 531, reh. den. 369 U. S. 857, 8 L. ed. 2d 16, 82 S. Ct. 931, involving frequent low landings and take-offs over the residence of the petitioner. The Supreme Court held that there had been a taking of property in violation of the Fourteenth Amendment. The reasoning of the court was expressed as follows:

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C.A.A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface

> right of way is [sic] for operation of a bridge, or as is the land necessary for the operation of a dam. See United States v. Virginia Electric & Power Co., 365 US 624, 630, 5 L ed 2d 838, 845, 81 S Ct 784. As stated by the Supreme Court of Washington in Ackerman v. Seattle, 55 Wash 2d 401, 413, 348 P 2d 664, 671, 77 ALR 2d 1344, ' . . . an adequate approach way is as necessary a part of an airport as is the ground on which the airport itself is constructed. . . . ' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

In the light of the above authorities we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

The next problem is whether an unconstitutional taking has resulted in the instant case. In considering this point the distinction must be made between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid. In the former instance, where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation. A common example of such an authorized restriction is the imposition on property of building set-back lines. *Gorieb* v. *Fox* (1927), 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675; *Bd. of Zoning Ap. of Decatur* v. *Jehovah's Witnesses* (1954), 233 Ind. 83, 117 N.E. 2d 115; *Goldsmith* v. *City of Indianapolis* (1935), 208 Ind. 465, 196 N. E. 525.

However, mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use. The latter can be effected only if compensation is provided. *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 67

L. Ed. 322, 43 S. Ct. 158; 1 Metzenbaum, Law of Zoning 70-76 (2d ed. 1955); *Griggs* v. *Allegheny, supra.*

With this distinction established, it becomes apparent that the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation.

True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114; 1 Metzenbaum, op. cit. *supra* at 708. An unconstitutional law cannot be made constitutional by merely providing a procedure which gives a complaining party the right of judicial review. *Finney* v. *Johnson* (1962), 242 Ind. 465, 179 N.E. 2d 718.

Our attention has been called to the fact that the preamble of the ordinance shows that its purpose is to exercise the right of eminent domain under the guise of the police power.[2] However, as has been stated:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn dufy—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, . . . is

[2] "WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, . . ." Gary Ordinance No. 2897 [dated Sept. 19, 1949].

> a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."
>
> *Mugler* v. *Kansas* (1887), 123 U. S. 623, 661, 41 L. Ed. 205, 8 S. Ct. 273; see also 1 Metzenbaum, *op. cit. supra* at 77-79.

The issue before us was considered by the Supreme Court of New Jersey in the case of *Yara Engineering Corp.* v. *Newark* (1945), 132 N.J.L. 370, 373, 40 A. 2d 559, 561. The City of Newark had adopted an airport zoning ordinance creating airport approaches and turning zones in the vicinity of the Newark Municipal Airport and regulating and restricting the height of structures in these zones. A proceeding was brought to set aside the ordinance. In holding the ordinance unconstitutional, the Supreme Court of New Jersey stated:

> "We conclude that this ordinance . . . is in fact the taking of private property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the State Constitution.
>
> "The City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. . . . "

See also cases cited at Anno. 77 A.L.R. 2d 1362.

The federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation. This is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S.D.N.Y. 1956), 144 F. Supp. 258, and *United States* v. *4.43 Acres of Land* (N.D.Tex. 1956), 137 F. Supp. 567, for air easements over property adjoining federal bases.

On the basis of the above authorities, we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

Appellee finally asserts that even though the ordinance unlawfully may have effected a taking of the land subsequently acquired by the toll road without compensation, it was the duty of "any immediate property owner" to protect himself by inverse condemnation proceedings under authority provided in the Eminent Domain Statute, citing §§ 3-1706 - 3-1711, Burns' 1946 Repl., and that they having failed to do so, their rights must be considered waived.

Appellees' position is not tenable for two reasons: The statute providing for inverse condemnation proceedings presumes (1) that the taking was an accomplished fact, and (2) that it took place under some constitutional authority, with respect to which, however, the prescribed procedure had not been followed. In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which are adjacent to, parallel with, are much higher than the toll road complained of. Furthermore, as heretofore discussed, the ordinance, upon which appellees' alleged property right is based, was wholly void insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is wholly void then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Judgment is reversed and the trial court is directed to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence.

MYERS, C. J., ARTE BURN & LANDIS, JJ., concur.

JACKSON, J., dissents [without opinion].

APPENDIX B

Ordinance No. 2897

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES, AND OTHERWISE REGULATING THE USE OF PROPERTY IN THE VICINITY OF THE GARY MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH AND TURNING ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; DEFINING CERTAIN TERMS USED THEREIN; PROVIDING FOR APPEALS THEREFROM; AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

WHEREAS, airport hazards endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has, through the power granted it under the Airport Act of 1945 and amendments thereto, adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land, and

WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has by Resolution recommended the adoption of this ordinance,

NOW, THEREFORE, PURSUANT to the powers granted by virtue of Section 9, Chapter 360, of the Acts of 1945; Chapter 174 of the Acts of 1947; and Chapter 109 of

the Acts of 1949, as well as its general police powers, BE IT ORDAINED by the Common Council of the City of Gary, Lake County, Indiana, as follows:

Section 1: SHORT TITLE—This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the City of Gary".

Section 2: DEFINITIONS—As used in this Ordinance, unless the context otherwise requires:

(a) "Airport" means the Gary Municipal Airport encompassing the area bounded by the Calumet River on the south, the E. J. & E. Railroad right of way on the west, and by the U. S. Highway No. 12 on the north and east.

(b) "Airport hazard" means any structure or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft.

(c) "Non-conforming use" means any structure or use of land which does not conform to a regulation prescribed in this ordinance or any amendment thereto as of the effective date of such regulations.

(d) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic and includes any trustee, receiver, assignee or other similar representative thereof.

(e) "Structure" means any object constructed or installed by man, including but without limitation buildings, towers, smoke stacks, and overhead transmission lines.

(f) "Landing area" means the area of the Airport used for the descend, landing, taking off or taxiing of aircraft.

Section 3. ZONES—In order to carry out the purposes of this ordinance, all the land within the boundaries of the Gary Municipal Airport and within two miles of the end of any proposed runway is hereby divided into:

(a) Turning Zones

(b) Outer Area Approach Zones

(c) Inner Area Approach Zones

(d) Transition Zones

the boundaries of which are shown on the Gary Airport Zoning Map dated April 12, 1949, and which is made a part hereof and incorporated herein by reference, two copies of which Map are on file in the office of the City Clerk and in the Office of the City Engineer, said Map shall be available for examination at all times that said respective Offices shall be open for business. There is hereby incorporated herein by reference and made a part hereof a Lay-Out Plan or Map, dated April 12, 1949, to be used in connection with the Gary Airport Zoning Map, two copies of which said Lay-Out Plan are on file in both the offices of the City Clerk and City Engineer, and which said Maps shall likewise be available for examination.

Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered, or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

All height limits shall begin at elevation of 590 feet above sea level.

Section 5: Non-Conforming Use—The regulations prescribed in Section 4. of this Ordinance, shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted and completed within two years thereof.

Section 6: Variances—Any person desiring to erect any structure or increase the height of any structure or use his property not in accordance with the regulations prescribed in this Ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance. All variances hereunder shall be granted by the Board of Zoning Appeals of the City of Gary as hereinafter constituted and all requests therefor shall be in accordance and under the rules and regulations of the Board of Zoning Appeals of the City of Gary, and all laws now in effect in respect thereto.

Section 7: Appeals—(a) The Board of Zoning Appeals of the City of Gary shall be and is hereby constituted the proper Board to which all appeals from decisions rendered in the enforcement of this ordinance or any other zoning ordinance shall be taken. All such appeals from the decision or ruling of any board, agency or department of the City of Gary in respect to such zoning ordinances shall follow the rules of the said Board of Zoning Appeals, and

all statutes of the State of Indiana in such case made and provided.

(b) Whenever notice of any such appeal shall be served upon any such board, agency or department of the City of Gary, it shall be the duty of the secretary, chairman or department head of any such board, agency or department to immediately notify in writing the Secretary of the Board of Aviation Commissioners of such appeal. The said Board of Aviation Commissioners shall have the power to intervene in such proceedings and be heard insofar as such ruling or decision may affect the operation of said Municipal Airport.

(c) No department, board or agency of the City shall have the power to grant variances hereunder except such Board of Zoning Appeals, and nothing contained herein shall prevent the Board of Aviation Commissioners from appealing such decision or ruling to the Board of Zoning Appeals, or prevent said Board of Aviation Commissioners from appealing any decision, grant or ruling of said Board of Zoning Appeals to a proper court as now provided by law.

(d) Whenever any petition or application shall be filed with the Board of Zoning Appeals for any variance under this ordinance or any other zoning ordinance affecting said Airport, the said Board of Zoning Appeals shall immediately notify the Secretary of the Board of Aviation Commissioners of such application or petition and the said Board of Aviation Commissioners shall be granted an opportunity to be heard in respect thereto.

(e) An appeal from the decision of any such Board, agency or department of the City of Gary to the Board of Zoning Appeals shall stay all proceedings of the action appealed from unless the aggrieved person or the Board of Aviation Commissioners certifies to the Board of Zoning Appeals after notice of appeal has been filed with it, that by reason of the facts stated in the certificate, a stay would

in his or its opinion cause unusual peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board of Zoning Appeals on notice to the Board of Aviation Commissioners on due cause shown.

(f) The Board of Zoning Appeals shall have the same power as is now granted unto it by law in relation to other zoning matters.

Section 8: Whenever and wherever enforcement of this ordinance necessarily involves property or real estate situated within the boundaries of another municipality, the Board of Zoning Appeals is hereby granted authority to act, if in conformance with the ordinances, rules, or regulations of such adjoining municipality, or may act jointly with a Board of Zoning Appeals of any other municipality; if such provisions shall be made by such municipality, it being the intention hereof to permit said Board of Zoning Appeals to cooperate and coordinate in its efforts with any other agency or board of any adjoining municipality towards enforcement in fact and in spirit of the purposes and intent of this ordinance.

Section 9: The construction, erection or maintenance of any airport hazard in violation of this ordinance is hereby declared to be a public nuisance.

Section 10: PENALTIES—Each violation of this Ordinance or any regulation, order, or ruling promulgated hereunder, shall be punishable by a fine of not more than $300.00 and each day a violation continues shall be a separate offense.

Section 11: CONFLICTING REGULATIONS—Where this ordinance imposes a greater or more stringent restriction upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this Ordinance shall govern.

Section 12: SEVERABILITY—If any of the provisions of the ordinance or the application thereof to any person or

circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 13: This ordinance shall be in full force and effect from and after its passage.

Passed by the Common Council of the City of Gary, Lake County, Indiana, this 19th day of Sept., 1949.

HOBART D. WIGGERLY
Presiding Officer

ATTEST: NICK P. ELICH
City Clerk

Presented by me to the Mayor for his approval and signature, this 20th day of Sept., 1949.

NICK P. ELICH
City Clerk

Approved and signed by me this 20th day of Sept., 1949.

EUGENE H. SWARTZ
Mayor, City of Gary, Indiana

APPENDIX C

Excerpts from Federal Airport Act, as Amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101)

SEC. 2. As used in this Act—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(3) "Airport development" means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport passenger or freight terminal buildings and other airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars.

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(5) "Project" means a project for the accomplishment of airport development with respect to a particular airport.

• • •

(7) "Public agency" means the United States Government or an agency thereof; a State, or Puerto Rico, the Virgin Islands, and Guam, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization.

(8) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(9) "Sponsor" means any public agency which, either individually or jointly with one or more other public agencies, submits to the Administrator, in accordance with this Act, an application for a grant of funds for airport development.

• • •

NATIONAL AIRPORT PLAN

Formulation of Plan

SEC. 3. (a) The Administrator is hereby authorized and directed to prepare, and thereafter, at least three months prior to the close of each fiscal year, to revise, a national plan for the development of public airports in the United States, including Puerto Rico and the Virgin Islands. Such plan shall specify in terms of general location and type of development, the projects considered by the Administrator to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, which projects shall include all types of airport development eligibile for Federal Aid under this Act and shall not be limited to any classes or categories of public airports. In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, the probable growth and requirements of civil aeronautics, and such other considerations as he may deem appropriate, and shall to the extent feasible, consult, and give consideration to the views and

recommendations of the Civil Aeronautics Board, the States, Puerto Rico and the Virgin Islands, and their political subdivisions, and shall, to the extent feasible, consult and give consideration to the views and recommendations of, the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by construction or operation of any radio station. In carrying out this section the Administrator is authorized to make such surveys, studies, examinations, and investigations as he may deem necessary.

* * *

FEDERAL-AID AIRPORT PROGRAM

SEC. 4. (a) In order to bring about, in conformity with the national airport plan prepared and from time to time revised as provided in this Act, the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized, within the limits of the obligation authority provided in section 5 to make grants of funds to sponsors for airport development and for advance planning and engineering therefor as hereinafter provided.

Announcement of Program

(b) It shall be the duty of the Administrator to make public by January 1 of each year the proposed program of airport development intended to be undertaken during the fiscal year next ensuing, and he may revise such program to the extent he finds necessary to accomplish the purposes of this Act.

* * *

SUBMISSION AND APPROVAL OF ADVANCE PLANNING AND ENGINEERING PROPOSALS AND PROJECTS

Submission

SEC. 9. (a) Subject to the provisions of subsections (b) and (c) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Administrator an advance planning and engineering proposal or a project application in such form, and containing such supporting information, as may be prescribed by the Administrator and setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport plan formulated by the Administrator under this Act, and all such proposed development shall be in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, and safety of approaches.

* * *

PROJECT SPONSORSHIP

SEC. 11. As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, con-

sistent with the terms of this Act, as he may deem necessary. Among other steps to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at Federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this Act to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

GRANT AGREEMENTS

SEC. 12. Upon approving an advance planning and engineering proposal or a project application, the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the advance planning and engineering proposal or project application an offer to pay the United States share of the planning and engineering costs or allowable project costs. Any such offer shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this Act and the regulations prescribed thereunder. Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this Act, and shall stipulate the obligations to be assumed by the sponsor or sponsors. If and when any such offer is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting, and thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. Unless and until such a grant agreement has been executed, the United States shall not pay, nor be obligated to pay, any portion of the costs which have been or may be incurred.

APPENDIX D

Indiana Tall Structures Act (5 Burns Ind. Stat. 14-327 et seq., 1963 Cum. Supp.)

14-327. *Public use airport—Unobstructed conditions for safe flight.*—The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated. [Acts 1957, ch. 23, § 1, p. 37.]

14-328. *Definitions.*—As used in this act [§§ 14-327—14-341], unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and

not for profit, religious corporations, municipal corporations and bodies politic. [Acts 1957, ch. 23, § 2, p. 37.]

14-329. *Permit required to erect, add to the height of or replace structure near public use airport.*—Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred [1,500] feet on either side of the extended center line of a runway or landing strip for a distance of two [2] miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty [150] feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand [3,000] feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one [1] foot vertically to every twenty [20] feet horizontally measured from such nearest boundary:

(b) at any other place within this state which will result in a structure extending more than five hundred [500] feet above the highest point of land within a one [1] mile radius from such structure. [Acts 1957, ch. 23, § 3, p. 37.]

14-330 *Excessive height—Restrictions—Issuance of permit.*—No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one

thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty [50] feet above the height of the highest structure in existence on the effective date of this act [§§ 14-327—14-341] which is within a distance of one [1] mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected [affected] by the provisions and requirements of section 3(a) [§ 14-329] of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty [30] days prior to any work, construction, or instalation on the proposed structure. [Acts 1957, ch. 23, § 4, p. 37.]

Compiler's Note. The bracketed word "affected" was inserted by the compiler.

14-331. *Application for permit.*—Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right that to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specif-

ically or within a definite area, and also the maximum height allowed for a structure. [Acts 1957, ch. 23, § 5, p. 37.]

14-332. *Visual identification characteristics specified in permit.*—Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit. [Acts 1957, ch. 23, § 6, p. 37.]

14-333. *Investigation of application for permit—Notice of determination—Hearing, request of applicant for—Appearance of parties.*—Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act [§§ 14-327—14-341]. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not issue or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the appli-

cation. Such determination shall become final twenty [20] days after notification thereof is served unless the applicant, within such twenty [20] day period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent. [Acts 1957, ch. 23, § 7, p. 37.]

14-334. *Conduct of hearing.*—Any hearing conducted pursuant to the purposes and provisions of this act [§§ 14-327—14-341] shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended [§§ 14-312—14-325]. [Acts 1957, ch. 23, § 8, p. 37.]

14-335. *Action of commission—Procedure for appeal and judicial review.*—Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure. [Acts 1957, ch. 23, § 9, p. 37.]

14-336. *Order to show cause why application for permit need not be obtained—Date for hearing.*—In any instance where the commission learns or has reasonable grounds to believe that any person is erecting or adding to a structure that would be subject to the provisions of this act [§§ 14-327—14-341] but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order. [Acts 1957, ch. 23, § 10, p. 37.]

14-337. *Remedies of commission—Enforcement of law, and rules, regulations or orders of commission.*—In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions

of this act [§§ 14-327—14-341] or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto. [Acts 1957, ch. 23, § 11, p. 37.]

14-338. *Rules and regulations, adoption and promulgation by commission—Administrative forms furnished by commission.*—The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act [§§ 14-327—14-341].

The commission shall prescribe and furnish forms necessary for the administration of this act. [Acts 1957, ch. 23, § 12, p. 37.]

14-339. *Exemption of area covered by airport zoning regulations—Change in height or location of prior structure.*—This act [§§ 14-327—14-341] shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act. [Acts 1957, ch. 23, § 13, p. 37.]

14-340. *Existing buildings or structures—Radio towers—Railroads—Application of law.*—The provisions of this act [§§ 14-327—14-341] shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by

railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof [§ 14-329]. [Acts 1957, ch. 23, § 14, p. 37.]

14-341. *Penalty for violation.*—Whoever violates or fails to comply with the provisions of this act [§§ 14-327—14-341] is punishable by a fine of not less than ten dollars [$10.00] nor more than five hundred dollars [$500]. Each day that such violation or failure continues is a separate offense. [Acts 1957, ch. 23, § 15, p. 37.]

APPENDIX E

The Provision of the Indiana Enabling Statute Pertaining to the Adoption of Airport Zoning by a Municipality (5 Burns Ind. Stat. 14-422)

14-422. *Air space—Zoning—Condemnation—Effect—Regulations.*—In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act [§§ 14-412—14-433], such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this act [§§ 14-412—14-433], the right to prevent the erection

of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structure above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act [§§ 14-412—14-433] shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act [§§ 14-412—14-433]. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable. [Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252.]

Amendments. The 1949 amendment substituted the word "council" for the words "governing authority" following the words "as provided by law, by the" in the first sentence. The amendment inserted the present third paragraph in the section.

APPENDIX F

Excerpts from Grant Agreement Between the City of Gary, Indiana, and the Civil Aeronautics Administration of June 1949

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON 25

GRANT AGREEMENT

Part I—Offer

Date of Offer June 22, 1949
Gary Municipal Airport
Project No. 9-12-007-701

To: The City of Gary, Indiana
(herein referred to as the "Sponsor")

From: The United States of America (acting through the Administrator of Civil Aeronautics, herein referred to as the "Administrator")

Whereas, the Sponsor has submitted to the Administrator a Project Application dated March 11, 1949 for a grant of Federal funds for a project for development of the Gary Municipal Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the Administrator, is hereby incorporated herein and made a part hereof; and

Whereas, the Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Land acquisition; clear and grub; grade; drain; turf; pave N/S (approx. 100′ x 3100′) and NW/SE (approx. 100′ x 3600′) runways, apron (approx. 150′ x 175′) and connecting taxiway; construct entrance road; furnish and install segmented circle marker and wind indicating device; approach clearance.

all as more particularly described in the survey map and plans and specifications incorporated in the said Project Application;

Now Therefore, pursuant to and for the purposes of carrying out the provisions of the Federal Airport Act (60 Stat. 170; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

The Administrator, for and on Behalf of the United States, Hereby Offers and Agrees to pay, as the United States' share of costs incurred in accomplishing the project, 25 percentum of the allowable land acquisition costs and 50 percentum of all other allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $166,000.00.

2. The Sponsor shall

   (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and

   (b) carry out and complete the Project in accordance with the terms of this Offer, and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and

   (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representatives.

3. The Sponsor shall operate and maintain the Airport as provided in the Project Application incorporated herein.

4. Any misrepresentation or omission of a materi l fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligations assumed by the Sponsor in accepting this Offer shall terminate the obligation of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.

5. The Administrator reserves the right to amend or withdraw this Offer at any time prior to its acceptance by the Sponsor.

6. This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

7. The Administrator, in tendering this offer in behalf of the United States, recognizes the existence of an agency relationship between the City of Gary, Indiana, and the Director of the Aeronautics Commission of Indiana, created by an Agency Agreement, executed by the President of the Board of Aviation Commissioners of Gary, Indiana on February 14, 1949, and by the Chairman of the Aeronautics Commission of Indiana on March 7, 1949, a copy of which is attached hereto and made a part hereof: and the Sponsor agrees that it will not amend, modify, or terminate said Agency Agreement without the prior approval, in writing, of the Administrator or his duly designated representative.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
THE ADMINISTRATOR OF CIVIL AERONAUTICS

By GEORGE W. WEST
Regional Administrator, Region III

Part II—Acceptance

The City of Gary, Indiana, does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 28th day of June, 1949.

CITY OF GARY, INDIANA
(*Name of Sponsor*)

By O. W. BADER
President, Board of Aviation Commissioners, City of Gary.

(SEAL)

ATTEST: C. H. SHAFER
Secretary

CERTIFICATE OF SPONSOR'S ATTORNEY

I, SAMUEL S. DUBIN, acting as Attorney for the City of Gary, Indiana, do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings taken by said City of Gary, Indiana, relating thereto, and find that the Acceptance thereof by said City of Gary, Indiana, has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Indiana, and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the City of Gary, Indiana, in accordance with the terms thereof.

Dated at Gary, Indiana, this 28th day of June, 1949.

SAMUEL S. DUBIN
City Attorney and Attorney for Board of Aviation Commissioners, City of Gary.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON, D. C.

PROJECT APPLICATION

For Federal Aid for Development of Public Airports

PART I

PROJECT INFORMATION

The City of Gary (herein called the "Sponsor") hereby makes application to the Administrator of Civil Aeronautics (herein called the "Administrator") for a grant of Federal funds pursuant to the Federal Airport Act of 1946 and the Regulations issued thereunder, for the purpose of

aiding in financing a project (herein called the "Project") for development of the Gary Municipal Airport (herein called the "Airport") located at latitude 41° 37′ N, longitude 87° 22′ W, in the City of Gary of the State of Indiana.

It is proposed that the Project consist of the following described airport development:

> Gary Municipal Airport, first stage construction consisting of grading, drainage, clearing, paving, in re SE-NW runway and N-S runway approximately 100′ x 3600′ together with parking apron and connecting taxi strip, seeding and sodding adjacent areas, providing access roadway and auto parking space as well as miscellaneous necessary construction.
>
> Also acquisition of a ten acre tract of land within the airport site at a cost as shown under Item 1.

* * *

PART II

REPRESENTATIONS

In order to induce the United States to enter into a Grant Agreement with respect to the Project, the Sponsor hereby represents and certifies as follows:

1. LEGAL AUTHORITY—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations: (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations: and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. FUNDS—The Sponsor now has on deposit, or is in a position to secure, $168,930.50 for use in defraying the costs of the Project. The present status of these funds is as follows: On deposit at Gary Trust & Savings Bank.

The above amount does not include the estimated U. S. Government share of the land costs, to-wit: $1,350.00.

3. LAND—The Sponsor holds the following property interests in the following tracts of land . . . which are to be developed or used as part of or in connection with the Airport, all of which lands are identified on the survey map which is attached hereto as Exhibit "A": Fee simple.

4. APPROVALS OF OTHER AGENCIES—The Project has been approved by all non-federal agencies whose approval is required, namely: Aeronautics Commission of Indiana.

* * *

7. FUTURE DEVELOPMENT — The Sponsor intends ultimately to develop the Airport as proposed in the current Master Plan Layout for the Airport, which plan has been mutually agreed upon by the Sponsor and the Administrator and intends to proceed with such further development when it is necessary and feasible. The Sponsor further represents that pending such further development and to the extent of its ability to do so, it intends to acquire the lands and interests therein necessary for such development or to take such other action as will protect such proposed lands or interests from any development thereof inconsistent with the intended airport use.

PART III

SPONSOR'S ASSURANCES

In order to furnish the Administrator the Sponsor's assurances required by the Act and the Regulations, the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and

effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes; *Provided,* That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further,* That the Sponsor may prohibit any given type, kind or class of aeronautical use of the Airport if such action will best serve the aeronautical needs of the area served by the Airport.

3. The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by Section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise, any exclusive right for the use of the airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(a) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish good, prompt and efficient service* adequate to meet all the demands for its service* at the Airport.

(2) to furnish said service* on a fair, equal and non-discriminatory basis to all users thereof, and

(3) to charge fair, reasonable and non-discriminatory prices for each unit of sale or service*; *Provided*, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

* * *

8. Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport; the Sponsor will also remove or cause to be removed any growth, structure, or other object

* Note: As used in these subsections the word "service" shall include furnishing of parts, materials and supplies (including sale thereof) as well as furnishing of service.

thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

9. All facilities of the Airport developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefore shall be determined by the Sponsor and the using agency.

10. The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

* * *

13. The Sponsor will maintain a master plan of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and

landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan in making any future improvements or changes at the Airport which, if made contrary to the master plan, might adversely affect the safety, utility, or efficiency of the Airport.

* * *

PART IV

PROJECT AGREEMENT

If the Project or any portion thereof is approved by the Administrator and an offer of Federal aid for such approved project is accepted by the Sponsor, it is understood and agreed that all airport development included in such project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the Administrator, and the Grant Agreement with respect to the project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 11th day of March, 1949.

CITY OF GARY

By O. W. BADER
President, Board of Aviation Commissioners.

Office-Supreme Court, U.S.
FILED
APR 16 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1000~~ 60

NICK JANKOVICH AND PAUL JANKOVICH,
CO-PARTNERS, DOING BUSINESS AS
CALUMET AVIATION COMPANY,
Petitioners.

vs.

INDIANA TOLL ROAD COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA.

MEMORANDUM OF THE CITY OF GARY, INDIANA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

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NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

MEMORANDUM OF THE CITY OF GARY, INDIANA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

INTEREST OF CITY OF GARY, INDIANA.

The decision below invalidates in toto the Airport Zoning Ordinance of the City of Gary. That ordinance was the governmental means chosen by Gary to protect safe and unobstructed approaches to the airport, to assure adjacent land use compatible with airport operations, and to serve these societal ends economically and with fairness to all. The decision below destroys the ordinance and

precludes any recourse to airport zoning. It relegates Gary to financially prohibitive acquisition of property interests as the only way to protect its public airport. It outlaws airport zoning in reliance upon which existing investments were made and future improvements planned. It undercuts the main bulwark upon which Gary's participation in the National Airport Plan under the Federal Airport Act was predicated. Gary therefore has a vital interest in being heard in defense of the integrity of its ordinance.

REASONS FOR GRANTING THE WRIT.

It would be pointless to repeat the considerations requiring plenary reivew by this Court which the petition sufficiently marshals. The importance of airport zoning in the scheme of air transportation is self-evident. Furthermore, the very fact that the decision below blanketly bans airport zoning of itself amply shows its indefensibility. And the arbitrariness of this *a priori* nullification of airport zoning is emphasized by the particular circumstances.

Thus, the Grand Calumet River divides the south boundary of the airport property from the north boundary of the toll road property. The river is the boundary. The toll road was not simply built on the river edge of the toll road property line. It was in fact constructed partly on the river bed itself. The toll road shifted the river bed north a distance varying from 100 to 175 feet; it brought the north line of the river bed 175 feet closer to the south line of the airport property, approximately the width of the river (R. 594-596, Pl. Exs. 15, 16). And the toll road was not built on the surface of the land. It was elevated about 30 feet above the surface of the land (Pl. Ex. 15, Def. Ex. A).

To construct a toll road partly on the river bed, to shift

the river bed the width of the river across the edge of an existing property line, and to elevate the road 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated by zoning. To limit the height of the structure at that point is even less demanding than an ordinary setback requirement from a lot line. This is not a dirt road on the surface of the land used by a farmer to carry his milk to the dairy or his grain to the barn.

Nor can it be tenably claimed that the decision below rests upon an adequate and independent state ground. The predicate of the Federal Airport Act is that local government has the power to zone property adjacent to a public airport to assure compatible land use. The potent financial incentive of the grant-in-aid program is the federal means used to activate exercise of the power which exists. Judicial nullification of the fact of power makes operation of the federal scheme impossible. Extension of judicial nullification to a few key states like California, Illinois, and New York would bring the National Airport Plan to a standstill. Since the premises of the Federal Airport Act are that (1) local power to zone exists, and that (2) federal financial stimulus can be reliably expected to activate the exercise of that power, judicial denial of the existence of any power which can be energized is totally inconsistent with the federal scheme. A state decision in conflict with a federal predicate can hardly rest on an adequate and independent state ground. Furthermore, since the essential source of the decision below is a misreading of the federal commands enunciated in *United States* v. *Causby*, 328 U. S. 256, and *Griggs* v. *Allegheny County*, 369 U. S. 84, it can hardly qualify as based on an autonomous state ground.

CONCLUSION.

The petition for a writ of certiorari should be granted in order that the constitutional place of airport zoning in governmental regulation of air transportation be firmly and authoritatively fixed.

Respectfully submitted.

MILTON ROTH,
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EUGENE TYLER,
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April, 1964.

BRIEF FOR THE RESPONDENT IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1060~~ 60

NICK JANKOVICH AND PAUL JANKOVICH, Co-Partners Doing Business as Calumet Aviation Company,

Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE ROTHROP-GARNER PRINTING COMPANY, CHICAGO

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IN THE

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OCTOBER TERM, 1963.

No. 1000.

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Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion below is correctly stated in Appendix A of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether a city can take an easement for low-level aircraft flights over privately-owned land situated in the direct path of a runway, by the mere enactment of a zoning ordinance without payment of compensation.

STATUTES INVOLVED.

The statutes involved are Ordinance No. 2897, as set forth in Appendix B of the Petition, and the Indiana enabling statute set out in Appendix E thereof.

The Federal Airport Act[1], portions of which are set out in Appendix C of the Petition, is not involved, as it has nothing to do with rights of ownership of Indiana property or the authority of Indiana municipalities to enact zoning ordinances.

The so-called Indiana Tall Structures Act set out in Appendix D of the Petition is not involved, as it did not become effective until April 1, 1957.[2] The complaint was filed below on July 26, 1956 (R. 5).

STATEMENT.

Petitioners' statement is accepted, with the following amplifications and corrections:

Petitioners were lessees of only a portion of the real estate comprising the airport, for the purpose of operating thereon the business of maintaining and servicing airplanes, selling parts, accessories and gasoline, training students in flying and other crafts and skills relating to aircraft, and other related activities (Pl. ex. 4, R. 570). The lease granted them the use of the runways and other airfield facilities in connection with the operation of their business.

The City of Gary, acting through its Board of Aviation

1. Petitioners apparently seek to invoke this statute because of the reference to zoning laws in Sec. 11(4) appearing at the top of page 22a of the Petition. This subsection, however, was not inserted in the Act until March 11, 1964 (Petition, p. 18).

2. Sec. 17 of the Act, omitted from Appendix D, provides that, "the same shall be in full force and effect from and after April 1, 1957."

Commissioners, retained full control over the operation of the airport in all matters relating to its public use (R. 960, 965, 1082, 1085, 1089, 1092, 1095, 1098, 1101, 1104, 1107, 1114, 1118, 1174, 1177, 1209, 1212, 1215, 1218, 1221, 1226, 1243, 1247).

Prior to construction of the road, respondent and the City of Gary entered into a written agreement, adjusting and settling disputes and controversies as to the location of the road and related matters, such as the changing of the location of the Calumet River, provision for possible extension of the northwest-southeast runway (not here involved), the effect of the road upon sewer facilities, the closing of certain streets, and the defining of various other property rights of the parties. The route proposed by respondent was approved by the City[1], subject to certain designated modifications and changes. As consideration the respondent agreed to pay the City of Gary $1,500,000.00. The agreement was approved by the Board of Aviation Commissioners (R. 949).

The petitioners asserted below that their business was damaged as a result of the alleged violation by respondent of the ordinance (R. 5-16). As a basis for their claim, the petitioners contended that, "zoning provisions constituted easements appropriated by the City which became a part of our leasehold." (Petitioners' brief below, p. 24).

The area in controversy is south of the north-south runway. The north edge of the road is 1,043 feet south of the end of the runway and is elevated 24.6 feet higher than the runway. This affords a glide angle of 42.4 to 1 to the runway as it now exists (R. 939).

---

1. In view of this agreement the present interest of the City of Gary as amicus curiae is of questionable significance. Any legal points suggested by its memorandum in support of the petition are fully covered by this brief and will be given no separate treatment.

The South Shore Railroad is located 1,349 feet south of the end of the runway, at right-angle thereto. This is an electrically powered railroad. It receives its power from a series of overhead cables, elevated 41½ feet above the level of the runway and supported by poles extending 56.2 feet higher than the elevation of the runway. These cables carry 1,500 volts of direct current (R. 917, 932, 1228-1232).

An electrical transmission line is located 1,435 feet south of the runway and at right-angle to it. There are two circuits on this line. One carries 34,500 volts and the other 4,000 volts. The line is supported by poles extending approximately 44 feet above the level of the runway (R. 917, 1181, 1187).

During 1954, pursuant to request of petitioner, Nick Jankovich, the City of Gary installed a series of six obstruction light poles in a line running approximately at right-angle to the runway. These poles have lights mounted on top of them for the purpose of warning pilots of the obstructions in the form of the electrical transmission lines and the overhead power system of the South Shore Railroad (R. 917, 939, 979, 1269).

The obstruction light 89 feet west of the projected centerline of the runway is 65.2 feet higher than the elevation of the runway and is 1,413 feet south of the runway. This affords a glide angle of 21.7 to 1 to the runway as it now exists (R. 939).

The obstruction light 82 feet east of the projected centerline of the runway is 61.5 feet higher than the elevation of the runway and is 1,386 feet south of the runway. This affords a glide angle of 22.5 to 1 to the runway as it now exists (R. 939).

Harold Zweig, City Engineer of the City of Gary, testified as follows:

> "We were primarily concerned with the east end of the east-west runway because the location of the Toll Road as originally planned formed an obstruction, an additional obstruction to the Airport which we did not have previously. Now, the reason our discussion centered around the east-west, not north-south, is that the north-south runway already had obstructions over which the Toll Road did not offer any additional obstruction and that in all our discussions we knew that the obstruction on the north-south runway, existing obstructions were greater than what the Toll Road would provide." (R. 1347).

After construction of the road petitioners' income from aircraft grossing 15,000 pounds or more increased in each year for which actual income figures were placed in evidence (Pl. ex. 20, p. 5; R. 795).

The alleged encroachment cannot be stated to have reduced the actual glide angle, or to have caused the runway to be "unusable for aircraft grossing 15,000 pounds or more." (Petition, p. 7) as such statement is contrary to the facts as enumerated above and as accepted by the Supreme Court of Indiana. In argument respondent will show that this aspect of the case constitutes an independent and local issue requiring denial of the writ.

ARGUMENT.

I.

NO NEW CONCEPT APPLIED.

In considering this case the Supreme Court of Indiana made a clear distinction "between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid." (Petition, p. 7a). The Court below did not hold that all airport zoning is invalid. It merely held that the particular ordinance in question was void "insofar as it purported to authorize the taking of private property without compensation therefor." (Petition, p. 10a). By this holding the Court below reaffirmed one of the fundamental constitutional safeguards of our nation. There is no reason to deduce that it has become obsolete.

Petitioners, however, refer to public airport zoning in terms that are far too general. They make broad references to diminution of use of adjoining land, and concede that even this may reach a magnitude which constitutes a taking, yet they would impose no limitation upon the use of a zoning ordinance by a municipality to carve out an easement across adjoining land as a direct extension of its runways. They accept as datum the statement of this Court in *Griggs* v. *Allegheny County*, 369 U. S. 84, 90, that, " 'an adequate approachway is as necessary a part of an airport as is the ground on which the airstrip itself, is constructed . . .' ", but they fail to recognize a taking when it is effected by a zoning ordinance.

Petitioners cite and quote from a varied array of material

in an attempt to indicate that zoning is the prescribed and authorized panacea for the elimination of obstructions to the landing and taking-off of aircraft at modern airports. Careful scrutiny indicates, however, that such material recognizes in clear language that there are limitations upon the use of airport zoning. For example, there is reference to a policy of the Civil Aeronautics Administration requiring that a city prevent obstructions by zoning, "if possible and within its powers." (Petition, p. 16). Language of this nature is found throughout the material contained in the petition. An agreement between the City of Gary and the Civil Aeronautics Administration is quoted as containing a provision that, "Insofar as is within its powers and reasonably possible," a sponsor will accomplish the desired objective, "either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods . . ." (Petition, p. 23). This indicates a recognition of the fact that there are times when a zoning ordinance is inadequate and the acquisition of an easement is required.

The Indiana enabling act set forth in Appendix E of the petition certainly recognized the limitation. By its terms it gave municipalities the authority to establish approach zones, but it also deemed it necessary to grant authority to "acquire by condemnation, upon the payment of due compensation * * * the right to prevent the erection of * * * structures * * * within such zone or zones which interfere with such gliding angle * * *" (Petition, p. 30a-31a). Of course, if this act had attempted to permit such acquisition without payment of due compensation, it would be subject to the same attack as the ordinance in question.

The federal government certainly recognizes the requirement that easements for the glide angle needed for landing

and take-off must be acquired by condemnation proceedings and payment of just compensation. As pointed out by the Court below, this is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S. D. N. Y. 1956), 144 F. Supp. 258 and *United States* v. *4.43 Acres of Land* (N. D. Tex.), 137 F. Supp. 567, for air easements over property adjoining federal bases.

Petitioners cite *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959), as being in emphatic conflict with the Court below. This is not so. *Harrell* involved a building which did "not lie directly in the path of any runway but considerably to the side of the direct approach area. . . ." (111 So. 2d 444). Nor was there any contention or finding that the zoning ordinance established an easement across the real estate in question as contended by petitioners and found by the Indiana Supreme Court in the instant case. Moreover, the land-owner, on appeal to the Supreme Court of Florida, abandoned the question of unlawful taking without compensation, and no question in this regard was ever before that court (111 So. 2d 442).

Petitioners assert that zoning is indispensable as a means of adjusting conflicting property and community demands, that the essence of civilized society is the adjustment of such competing demands, and that acquisition of necessary approachways by purchase or condemnation is financially prohibitive. This argument, however, is defeated by the eloquent simplicity of the statement of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

II.

NO IMPORTANT QUESTION REMAINS UNANSWERED.

A question that has been answered is no longer a question of importance. *U. S.* v. *Causby*, 328 U. S. 256, and *Griggs* v. *Allegheny County*, 369 U. S. 84, have given a clear and unequivocal answer to the question as to the rights of owners of property adjacent to the ends of runways, over which low-level flights must be made:

> "We start with *United States* v. *Causby* (U. S.) supra, which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of an air easement for which compensation must be made. * *
>
> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C. A. A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. See *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 630, 5 L. ed. 2d 838, 845, 81 S. Ct. 784. As stated by the Supreme Court of Washington in *Ackerman* v. *Seattle*, 55 Wash. 2d 401, 413, 348 P. 2d 664, 671, 77 ALR 2d 1344, '. . . . an adequate approach way is as necessary a part of an airport as is the ground on which the

> airstrip itself, is constructed. . . .' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." (369 U. S. 88-90.)

No better statement can be made of the constitutional standards to be applied in such cases. Petitioners concede that there was a taking of an air easement which, in turn, inured to their use under their lease. They must also accept the consequence that by constitutional standards compensation must be paid for such easement, and that, therefore, a zoning ordinance is not an acceptable substitute. This is the basis for the decision below. It is sound, and needs no review.

III.

INDEPENDENT GROUNDS SUPPORT THE DECISION BELOW.

Although the Court below reviewed pertinent decisions of this Court, its opinion was primarily grounded on state law concepts of real property, and clearly involved an interpretation of the zoning ordinance in question. The Court found that under Indiana law a land owner is the owner of the airspace above his property to the extent that such airspace may reasonably be used by him, citing Indiana Acts 1927, ch. 43, p. 119, Burns 1956, Repl. § 14-103 and *Capitol Airways, Inc.* v. *Indianapolis Power and Light Co.*, 215 Ind. 462, 18 N. E. 2d 776 (1938) (Petition, p. 5a). The Court framed the issue as one involving both "Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States." (*Id.*, p. 3a). Both of these constitutional provisions were set forth verbatim in the opinion below (*Id.*, p. 4a). The ordinance

in question was interpreted as taking and appropriating "the ordinarily usable airspace of property adjacent to the Gary Airport without the payment of compensation" (*Id.*, p. 8a) —an interpretation binding on this Court. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. Among the other non-federal authorities relied upon were: *Finney* v. *Johnson*, 242 Ind. 465, 179 N. E. 2d 718 (1962); *Board of Zoning Appeals of Decatur* v. *Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); *Goldsmith* v. *City of Indianapolis*, 208 Ind. 465, 196 N. E. 525 (1935); *Ackerman* v. *Port of Seattle*, amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958); *Yara Engineering Corp.* v. *Newark*, 132 N. J. L. 370, 40 A. 2d 559 (1945); and 1 Metzenbaum, Law of Zoning, 70-76 (2d ed. 1955). This analysis leads inexorably to the conclusion that the decision below rests upon independent non-federal grounds, adequate to support the judgment. There is thus a clear lack of jurisdiction in this Court. *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

Furthermore, as heretofore indicated, petitioners' action for damages was based upon the theory that respondent's road wrongfully encroached upon the glide angle at the south end of the north-south runway, that this interfered with the use of the runway by heavier aircraft, and that as a consequence petitioners' business was diminished. Respondent contended that before and after the construction of the road the controlling obstacles were the power lines south of the runway, as shown by the scientific and uncontroverted measurements and the testimony of the City Engineer as set forth above in respondent's amplification of the statement of the case, that as a consequence the road added no obstruction, and, therefore, the road caused no damage to petitioners' business. This is confirmed by petitioners' evidence that their income from

heavier aircraft actually increased in each year following completion of the road (Pl. ex. 20, p. 5; R. 795).

The Court below accepted respondent's contention, as indicated by the statement of the Court that, "the power lines which are adjacent to, parallel with, are much higher than the toll road complained of." (Petition, p. 10a). This resolves an independent and local issue of proximate cause, in a manner requiring a judgment in favor of respondent. Thus, the decision below is correct, without regard for the question sought to be raised by the petition.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

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May 1964.

REPLY BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~1,000~~ 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR PETITIONERS

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---

REPLY BRIEF FOR PETITIONERS

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1. The decision below is in conflict with the decision of the Alabama Supreme Court in *Baggett* v. *City of Montgomery*, 8 CCH Aviation Cases 18,137 (December 12, 1963). The city of Montgomery enacted an airport zoning ordinance embracing "all land within a radius of two miles of the airport" (*id.* at 18,137). The ordinance limited the use of designated land to "agricultural uses, horticulture, one-family residences, and flying fields"; it restricted lots for residential purposes to

certain sizes; it prohibited apartments and duplex houses; and it provided that "no structure or tree shall exceed two and one-half stores or thirty-five (35) feet in height..." (*ibid.*). The policy underlying the ordinance was expressed in virtually the same terms as the Gary ordinance (*id.* at 18,138). And provision for variance was made in virtually the same terms as the Gary ordinance (*id.* at 18,139).

The Alabama Supreme Court held that the ordinance had a valid scope for operation on its face and that it could not therefore be illegalized because of anticipated arbitrary application in particular circumstances. Said the Court (*id.* at 18,138).

> In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided the restrictions were in whole or in part reasonably related to all or part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act.

The Court observed that the provision for variance, and the adequate hearing procedure in conjunction with it, sufficiently safeguarded against arbitrariness (*id.* at 18, 138-18, 139). See also, Strunck, *Airport Zoning And Its Future*, 50 ABAJ 345 (April 1964).

The court below took an opposite tack. According to it "the passage of the ordinance" of itself constituted an appropriation of "the ordinarily usable air space of property adjacent to the Gary airport without payment of compensation," and its nullification was therefore required without regard to the provision that "an aggrieved landowner might apply for a variance. . ." (Pet. p. 8a). Reliance by respondent (Opp. pp. 9-10), as by the court below, upon this Court's decisions in *Causby* and *Griggs* to justify this sterilization of governmental potency to regulate land use alone demonstrates the importance of review by this Court to check the grave misapplication of its decisions.

2. Respondent's stress of other obstructions to access to the airport is wholly beside the point (Opp. pp. 4-5, 11). These other obstructions were nonconforming uses which preexisted the ordinance, and negotiations to remove them had been in progress but were terminated as futile when the toll road was built (R. 544, 594, 704-705). For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstructions (R. 594, 691, 697, 716). This was the necessary finding of the trial court when it rendered judgment for the petitioners in the sum of $164,000, and this finding was undisturbed by the court below which invalidated the ordinance on the sole and exclusive ground that it was void on its face. Advertence by the court below to the "power lines which are adjacent to, parallel with, . . . [and] much higher than the toll road" was one basis for its rejection, unclear in its logic, of petitioners' contention that if respondent thought its land had been taken it should have sought compensation by inverse condemnation proceedings

(Pet. p. 10a).* But the court below did not hold that the construction of the toll road had not violated the ordinance and that petitioners had not been injured by it. It simply rendered these factors irrelevant by its holding that the ordinance "was wholly void. . ." (Pet. p. 10a).

3. Chivying with the evidence does not obscure the central fact that the ordinance was never challenged as, and the court below never held that it was, arbitrary in its specific application to the toll road construction. It was attacked as, and was held by the court to be, void on its face because it prescribed limitations on the use of property adjacent to the airport. It is this blanket proscription of airport zoning which poses the vital question that this Court should review.

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* "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, Wash. S. Ct., No. 36,996, decided April 23, 1964, sl. op. p. 1, n. 1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

vs.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF AMICI CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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BRIEF AMICI CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Interest of Amici Curiae

The National Institute of Municipal Law Officers is an organization composed of over 1200 municipalities located in each of the 50 states, and the District of Columbia. Each member city acts through its chief legal officer known either as a City Attorney, Director of Law, Corporation Counsel, or by a similar title.

This Brief is filed pursuant to Rule 42(4) of the Rules of this Court. The members of the National Institute of

Municipal Law Officers are political subdivisions of states, and this Brief is sponsored by their authorized law officers.

The issues presented in this case vitally affect every municipality in the United States served by a public airport. The Indiana Supreme Court would forbid municipalities to protect the physical safety of the general public by airport zoning laws imposing height limitations on structures, adjacent to airports, which might invite air disasters. The effect of its decision is to prohibit as unconstitutional any and all airport zoning laws enacted for safety purposes.

The conclusion of the Supreme Court of Indiana is directly opposed to long standing United States Congressional policy expressed in requirements for the grants-in aid under the Federal Airport Aid Act. The 1946 Act required assurances from municipal airport operators that existing airport hazards would be mitigated and new ones prevented. (49 USC § 1110 (3)). Federal Regulations provide that airport zoning is an acceptable basis for making this assurance. (14 CFR § 151.11(f). This year Congress amended the Act to require additional assurances "including the adoption of zoning laws" that the use of neighboring land would be "compatible with normal airport operations." (49 USC § 1110(4)).

The conclusion below is also opposed to express enabling legislation in 42 States, and the decisions of this Court. Its effect is to impose upon public airport operators, stripped of the benefit of any police power regulation, a choice to (1) either compromise with the safety standards formulated by the Federal Aviation Agency or (2) assume a huge financial burden to pay neighboring property owners not to erect obstructions or (3) curtail operations at their airports, to the detriment of the municipalities they serve, as well as the nation at large.

The effort of your *amici* is to urge this Court not to withdraw the police power from the nation's cities so as to force the payment of compensation beyond anything commanded by *United States* v. *Causby*, 328 U.S. 256 and *Griggs* v. *Allegheny County*, 369 U.S. 84.

The interest of your amici is to see that the public airport operators who, as the federal grant-in-aid program itself testifies, were admittedly incapable of financing all the necessary airport construction and development before the *Griggs* case (S. Rep. No. 224, 79th Cong., 1st. Sess.) and whose problems have been compounded by the *Griggs* case shall not be further disabled in their difficult effort both to provide for the public safety and to provide and maintain adequate public airport service.

Summary of Argument

Zoning to assure compatibility between neighboring property owners in the use they make of their respective properties has long been recognized as a valid exercise of the police power. An airport operator, whether the federal government, a private person, a public agency other than the local municipality, or a municipality itself, is such a property owner seeking compatibility with its neighbors and seeking to be compatible with them. The local municipality may use its police power to assure such compatibility by enacting an ordinance such as Gary's just as it may assure compatibility between neighboring residential and commercial districts. The fact that the airport operator may be the agency of government exercising the police power cannot affect this result.

The City of Gary enacted its airport zoning ordinance to protect the general public, both in the air and on the ground near the airport, from air disasters resulting from hazardous obstructions. As such the ordinance satisfies

the traditional constitutional tests of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, for valid zoning in the exercise of the police power in that it bears a substantial relationship to public safety and, based as it is on standards developed and sanctioned by the federal government, is not arbitrary or unreasonable.

There is a distinct and controlling difference between (a) such an exercise of the regulatory power by a municipality in the interest of safety and (b) the potential liability of an airport operator, in extreme cases, to compensate a property owner in the neighborhood of an airport because of the consequences of aircraft flying too low, too frequently and too disturbingly over his property. It is only actual aircraft flights of the *Griggs* type which can occasion a taking of an easement through the air. An airport anti-obstruction height restriction, like any other height restriction or set-back ordinance, has no relationship to the quality and quantity of aircraft flights which trigger the application of *Causby* and *Griggs*. Such an ordinance may limit the owners use of his property but is not thereby rendered invalid.

The airport zoning ordinance is not a substitute for any condemnation required by *Griggs*. Indiana law and the Federal Constitution require the payment of compensation when property rights are acquired. It is, of course, true that such an ordinance might have particular applications which would be unconstitutional. But speculation as to potential confiscatory application in some instances cannot overcome the presumption of contitutionality of the ordinance, even with regard to its application in the particular case. Besides, in this case Respondent has made no showing of any such unconstitutional application and therefore, under *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, there is no basis for holding that the application of the

Gary Ordinance would be unconstitutional to this plaintiff. There is even less warrant for holding, as the Indiana Supreme Court has done, that the entire ordinance, and indeed, any airport zoning ordinance, is necessarily invalid.

ARGUMENT

1. Airport Operators

In this country airports are owned both by public and private agencies. There are several different types of public owners. Washington National Airport and Dulles International Airport are owned by the federal government in the State of Virginia. Military airports are owned by the federal government in many of the states. State agencies which have no legislative power are often the owners of airports as in the case of Boston's Logan International Airport owned by the Massachusetts Port Authority. In some instances such as the Greater Pittsburg Airport involved in the *Griggs* case, the owner of the airport is the county and not the municipality which is principally served. And in other cases, such as the instant case, the municipality may itself own the airport. It is this latter circumstance which appears to have led the Indiana Supreme Court to see in the present ordinance a "taking" of property for the use of the city as such rather than the exercise of the police power to preserve the public safety from particular hazards.

If a municipality enacts airport zoning regulations for safety purposes because a privately-owned airport is located within its environs, surely it cannot be said that the municipality is taking property for its own use. The result should be no different where the airport is municipally owned. The validity of such a zoning ordinance should be appraised without considering the immaterial

element that in any particular case the airport may happen to be owned by the enacting municipality rather than by a private operator or another public agency at the federal, state or county level. The two capacities in which such a municipality acts are wholly independent of each other.

2. The Gary Zoning Ordinance

The error of the Supreme Court of Indiana stems from a failure to understand just what the Gary Airport Zoning Ordinance is and, more particularly, what it is not.

What is under review is an ordinance which, according to its preamble, seeks to avoid "airport hazards [which] endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity." The ordinance is a limitation on the heights of structures in the airport area because it is necessary in the interest of the public health, public safety and general welfare that creation or establishment of airport hazards be prevented. It is a legislative determination that the interests of safety, both of the property owners themselves and their neighbors, and of the traveling public using the airport, require the prevention of structures at heights which might invite air disasters. (Record, pp 151, 152).

This airport zoning ordinance is not, in purpose or effect, a substitue for just compensation. In a situation where an aerial easement has been taken by the public under the exceptional circumstances alleged in *Griggs* v. *Allegheny County*, 369 U.S. 84, the Federal and Indiana Constitutions require the payment of compensation. This is what the Indiana Supreme Court missed. Obviously where the disturbing quality and quantity of aircraft overflights is so extreme so as to constitute a taking of property under the *Griggs* doctrine no local ordinance can undo that result.

3. Zoning Against Obstructions Around Airport Valid Exercise of Police Power

Airport zoning, as a reasoned legislative solution to a problem generated by our time and our technology, possesses no constitutional defect. Such legislation serves the interests of the general public in protection from aircraft disasters and the fostering of air commerce as a significant factor in the developing prosperity of this country. Regulating the interests of a landowner in air above his property is well within the constitutional framework for legislative protection of the public interests.

The constitutionality of zoning ordinances to assure compatibility of adjoining land uses was settled by this Court's landmark decision in *Euclid* v. *Ambler Realty Co.* There the question resolved itself utimately to whether a restriction on the use of real property could be imposed under the police power without the payment of compensation. The Court answered in an emphatic affirmative, and in language which applies fully to the new technology involved in this case, remarked:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify

> traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable." (272 U.S. at pp. 386-387).

The constitutionality of laws enacted under the police power which imposed height restrictions on private property for safety purposes was sustained even before *Euclid* in *Welch* v. *Swasey*, 214 U.S. 91.

The Indiana Supreme Court found merit in the oversimplified premise that any height restriction on the use of land to protect the public from air disasters constituted an appropriation of air space for which the property owner was entitled to compensation. Contrary to the tests of *Euclid* and *Welch*, it declared the Gary ordinance to be void on its face without inquiring into its reasonableness, its vital relation to public safety, the nature of any alleged appropriation that had resulted, and the flexibility permitted under the Constitution to use the police power to resolve the unique problems generated by the burgeoning growth of air commerce.

In the zoning cases which have come before this Court, the argument is repeatedly made that zoning ordinances operate to effect a "taking" of plaintiffs' property. Yet, no zoning ordinance has ever been declared invalid by the Court on such ground. Such laws have been invalidated only where they were clearly arbitrary and unreasonable, *Eubank* v. *Richmond*, 226 U.S. 137; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116; or they bore no substantial relation to the public health, safety, morals or general welfare, *Nectow* v. *Cambridge*, 277 U.S. 183. The "taking" argument was conclusively discredited in a zoning context in *Euclid* and *Gorieb* v. *Fox*, 274 U.S. 603, which expressly referred to limitations on "the height

of buildings." See also *Zahn* v. *Board of Public Works*, 274 U.S. 325.

An airport zoning ordinance, like any zoning law enacted under the police power, must be upheld unless it offends the clearly defined constitutional test enunciated in *Euclid* v. *Ambler Realty Co.* in that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." (272 U.S. at p. 395).

Clearly, the height restrictions imposed by the ordinance meet the test of reasonableness, based as they are on airport obstruction standards developed by the Civil Aeronautics Administration. And obviously, the ordinance, seeking to prevent obstruction hazards, bears more than a substantial relation to public safety.

This reasoning underlies the state court decisions which have upheld airport zoning. *Baggett* v. *City of Montgomery*, 160 So. 2d 6 (Ala. 1963); *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959)).[1]

In addition to zoning laws (*Euclid*, *Welch*, *Gorieb* and *Zahn*, supra,) this Court has time and again confirmed the validity of regulations restricting the use of land without compensation to the landowner. It has upheld, as valid exercises of the police power, statutes or ordinances which have required the shutting down of gold mines,

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[1] In *Burnham* v. *Beverly Airways*, 42 N.E. 2d 575 (Mass. 1942). *Banks* v. *Fayette County Board*, 313 S.W. 2d 416 (C.A., Ky. 1958) and *Bowling Green-Warren County Airport Board* v. *Long*, 364 S.W. 2d 167 (C.A., Ky. 1962), the courts discussed airport zoning in contexts which indicated that they had had no reservations concerning their constitutionality. *Yara Engineering Corp.* v. *Newark*, 132 N.J.L. 370, 40 A. 2d 559 (1945), cited below, held only that the municipality had not been authorized by the state legislature to enact zoning regulations. *Roarke* v. *City of Caldwell*, 33 U.S. Law Week 2089 (Idaho 1964) followed the Indiana Supreme Court below.

United States v. *Central Eureka Mining Co.*, 357 U.S. 155; slaughter houses, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36; breweries and distilleries, *Mugler* v. *Kansas*, 123 U.S. 623; cemeteries, *Laurel Hill Cemetery* v. *San Francisco*, 216 U.S. 358; billiard halls, *Murphy* v. *California*, 225 U.S. 623; livery stables, *Reinman* v. *Little Rock*, 237 U.S. 171; and brickyards, *Hadacheck* v. *Sebastian*, 239 U.S. 394. It has upheld the validity of regulations which limited the income which an owner could derive from his property. *Block* v. *Hirsh*, 256 U.S. 135; *Brown Holding Co.* v. *Feldman*, 256 U.S. 170. It has even approved laws requiring property owners to destroy their property without compensation in the public interest. *Miller* v. *Schoene*, 276 U.S. 272. In none of these cases did the Court find a "taking" of property, despite the fact that the result of the legislative exercise of the police power caused severe economic detriment to the property owner.

As recently as 1962, this Court upheld a town safety ordinance which absolutely prohibited the use to which the property in question was put and which was "its most beneficial use." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 citing with approval *Hadacheck* v. *Sebastian*, 239 U.S. 394 where no "taking" was found to result from a regulation forbidding the use of property as a brickyard and causing a diminution in its value from $800,000 to $60,000.

Even more recently this Court dismissed for want of a substantial federal question an appeal from a decision of the California Supreme Court which upheld, as a valid exercise of the police power, a zoning ordinance which completely prohibited the use of property for the only economic purpose for which it was fit. *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342 (1962), appeal dismissed 371 U.S. 36.

In *Consolidated*, the California Supreme Court dealt

with *Pennsylvania Mining Co.* v. *Mahon*, 260 U.S. 393, cited by the Indiana court below, wherein this Court struck down a Pennsylvania statute which prohibited the mining of coal in such a way as to cause a subsidence of surface structures. The California court pointed out that the *Mahon* decision preceded this Court's affirmance of the constitutionality of comprehensive zoning ordinances and within such a context has no application (370 P. 2d at p. 350).

4. Airport Zoning Ordinance Not Invalid By Fact Aircraft May Fly Over Property—Taking Distinguished

The basis of the decision below was that all airport zoning is inconsistent with this Court's rulings in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84. We see no conflict between the Gary safety ordinance and the doctrine of those cases. The ordinance seeks to avoid obstructions which could cause aviation disasters whereas the two cases deal with the proven effect of a certain extreme quantity and type of actual aircraft flights in the vicinity of an airport.

At least five different theories exist with respect to the nature and extent of the ownership of air space above private property. (See Rhyne, *Municipal Law* (1957) §§ 22-24.) The theory that the landowner owns all the air space above his land without limit or extent (*"ad coelum"*) is clearly unacceptable and has been rejected almost unanimously by the courts. Nevertheless the Indiana Court would invalidate an airport zoning ordinance even where the restrictions relate to air space in which the surface property owner could have no legal ownership and without consideration of any actual interference by aircraft flights. It has thus, in an airport zoning context, resuscitated the

discredited *ad coelum* concept of unlimited air space ownership.

Griggs and *Causby* do *not* stand for the discredited proposition that a property owner has an absolute right of ownership of the airspace above his property such that any "invasion" of it by aircraft entitles him to compensation. In *Causby*, this Court applied the *coup de grace* to that concept which was already *in extremis*.

The doctrine of airport zoning limiting the height of hazardous obstructions and the doctrine of *Causby* and *Griggs* operate in completely different spheres. In the latter an actual physical damage to property is involved. In the case of anti-obstruction zoning we merely have a limitation on the height of structures, which has never been held to constitute compensable physical damage to the affected property. The distinction is manifest if one assumes the case of a new airport with modest air traffic such that the *Griggs* doctrine cannot apply. Obstructions must nevertheless be avoided even for the occasional aircraft using the airport. The police power to adopt an anti-obstruction airport zoning ordinance is not ousted just because some day in the future air traffic might change and compensation to certain adjoining property owners might come to be required under the *Griggs* doctrine.

The Indiana Supreme Court has thus confused two activities which are logically and legally different.

In view of the repudiation of the *ad coelum* doctrine, a property owner can have his rights in airspace "taken" only when the government has transferred unto itself whatever private rights in airspace are actually recognized by the Courts. And *Causby* makes it clear that aircraft overflights may achieve such a result only in extreme circumstances:

> **"Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." (328 U.S. at p. 266).**

Mere flights of aircraft above private property, without more, do not constitute a "taking."

Where, however, flights are "so low and so frequent as to deprive the owner of the substantial enjoyment of his property", there may, under *Causby*, be a taking. *Griggs* said that the taking may be attributed to the airport operator where the airport is so laid out as to make such flights unavoidable. In *Griggs* the property owner's claim was that aircraft regularly passed as low as 30 feet over his rooftop.

Under these circumstances this Court analogized the aircraft glide path to the surface right of way for the operation of a bridge, to impose an obligation upon the airport operator to compensate the injured land owner. The simile, of course, cannot be taken too literally. Before an airport is open for use, there is no highway through the sky interfering with the property owner's enjoyment of his property, whereas the physical construction of a bridge approach over his property takes his property for public use even before traffic begins to roll. Similarly, if the air traffic over a particular parcel of property is not frequent enough to meet the criteria of *Causby* and *Griggs* for any other reason, a highway through the air does not exist, and nothing is taken from the property owner. Such infrequency can occur because the particular airport is not a busy one or because the adjacent property does not lie beneath the established flight paths of aircraft using the airport. It may also occur where a particular runway is rarely used, either because of prevailing winds or because

of preferential runway regulations in force to minimize disturbance of the airport neighbors.

Then again, most aircraft using an airport may, if they regularly fly over a particular parcel of property at all, fly sufficiently high as to be outside the prohibition of *Causby* and *Griggs*. This would also be the case with respect to immediately adjacent property owners where the airport runway ends are situated well within the airport boundaries and where the property lies between rather than under the theoretical extension of the runways. Many of the parcels to which a zoning ordinance such as *Gary's* would apply are sufficiently distant from the airport so that aircraft dispersion, particularly after take-off, causes direct and low overflights to occur, if at all, too infrequently to invoke the taking doctrine of *Causby* and *Griggs*.

In addition there may be lacking the third element necessary for an application of the *Causby* and *Griggs* doctrine i.e. detriment to a degree so markedly beyond what might constitute a common law nuisance as to have crossed the line which separates possibly tortious interference, dependent on the laws of the particular state, into the zone of constitutional deprivation prohibited by the Federal Constitution.

The absence of detriment can occur even in situations involving recurring flights which are relatively low. For example, the only aircraft using a particular airport might be of the Piper Cub variety, which generate little more noise than an ordinary delivery truck. Or the affected property may be put to an industrial use which is perfectly compatible with greater noise volumes.

Griggs and *Causby* do not require constitutional compensation, as the Indiana Supreme Court assumes, every time a property owner can show that aircraft approaching

and departing from an airport occasionally pass directly over his property, or even disturb him on occasion. And yet, in every situation where there is a potential hazard by way of obstructions, it is certainly the business of government, particularly local government, to exercise its police power in the interest of the public safety to avoid disasters whether or not the actual flights which may occur have reached the extreme proportions which alone justify the application of *Causby* and *Griggs*.

The issues involved in the present case and in the *Causby* and *Griggs* cases are simply not related to each other. One structure over 500 feet in height well out from the airport runway can be a hazard not only to the lives of the air traveling public but to all of the residents in the area. Such an obstruction may be prohibited even though aircraft in that location may be so infrequent as to raise no question of the application of *Causby* and *Griggs*. And such a structure should be prevented if no aircraft in that vicinity might normally fly no lower than 600 feet above the surface, an altitude far greater than anything prohibited in *Causby* and *Griggs*.

On the other hand this type of ordinance is not meant to be a substitute for just compensation where the facts of *Causby* and *Griggs* are duplicated and in any such event it could not displace the owner's right to compensation for the taking which would occur. But the duplication of the *Griggs* fact situation, if proved, does not create any additional right to be compensated for the prohibition of the obstructions under the airport zoning ordinance.

The distinction between the right to compensation for actual physical damage incurred as a result of aircraft over-flights in the extreme situations which occurred in *Causby* and *Griggs*, and the alleged right to compensation for an "appropriation" of property by virtue of a zoning

ordinance which merely restricts the height of structures, is too patent to be ignored. This distinction is strikingly analogous to the distinction, repeatedly recognized by the federal courts, between two different rights in air space which the federal government has acquired. The first has been the right to prevent obstructions by height limitations and the second has been the right to fly aircraft through the affected space. Confused attempts to unite the two occurrences as a single event appear in cases where the federal government was condemning air space over private property around federal airfields solely to prevent and eliminate safety hazards.[2]

In these cases, the government condemned what are best described as "obstruction easements" over private property. But the property owners sought damages for "resulting" overflights, contending that the government was actually taking property for purposes of aircraft passage. Such damages were consistently denied, the courts maintained that the government was not taking "avigation" easements to permit the flight of aircraft over the condemnees' property and thus was not obliged to pay for them. The government merely sought to restrict the

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[2] Where there is no applicable state or municipal zoning, the federal government must, of course, *condemn* blocks of airspace around its airfields to eliminate safety hazards. Federal agencies have no power to regulate land uses within the sovereign States. Thus, the citation by the Indiana Supreme Court of *United States* v. *45.10 Acres of Land*, 144 F. Supp. 258 (S.D. N.Y. 1956), *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956) for the proposition that the federal government has recognized the need to condemn and pay just compensation to eliminate flight hazards is misleading. These cases prove only what is self-evident, that the federal government, lacking authorization to exercise zoning powers within the sovereign states, must, where there is no state or local zoning, exercise the power of eminent domain to prevent the erection of airport obstructions.

height to which property could be developed, just as airport zoning regulations do.

In *United States* v. *64.88 Acres of Land*, 244 F. 2d 534, 535-6, (3 Cir. 1957), the Court of Appeals made the following lucid analysis:

> "... [A]ppellee insists that in effect the government is, or may be, imposing on his land a greater servitude than is actually asserted. Appellee is apprehensive that the government may be taking, or as a result of this taking will claim, a right to fly aircraft very low over his land. The government denies that it is taking any right to fly in the air space above appellee's land or that it contemplates claiming any right of flight beyond that which, under the rationale of *United States* v. *Causby*, 1946, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, exists at all times without any taking from the landowner below. In this connection it is pointed out that the elevations defining the altitude above which no obstructions are to be permitted are substantially lower than any flight path which could lawfully be used or approved for approaching the present Greater Pittsburgh Airport under the regulations of the Civil Aeronautics Authority.
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> "On this record it must be accepted that the claimed right of clearance is merely a provision for assuring that space shall be unoccupied and vision unobstructed above a designated altitude. Unquestionably, this is in aid of avigation. But no flight easement is mentioned or to be inferred, much less claimed, in the present pleadings and, therefore, no servitude can be imposed except for the asserted and precisely limited rights of clearance. . . . If any subsequent low flying of aircraft

> over appellee's land should occur and should be said to invade property rights, the acquisition of the right to keep that space clear will not have conferred any attendant right to fly through it."

The same result was reached on an identical predicate in *United States* v. *Brondum*, 272 F. 2d 642 (5 Cir. 1959); *United States* v. *452.13 Acres of Land*, 207 F. Supp. 323 (N. D. Fla. 1962); *Western* v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962); *United States* v. *765.56 Acres of Land*, 164 F. Supp. 942 (E.D. N.Y. 1958) aff'd. 276 F. 2d 264 (1960); *United States* v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D. N.Y. 1956); *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956).

Neither the federal government's condemnation of "obstruction easements" nor a municipality's imposition of height restrictions through zoning involves consideration of the effect of aircraft flights to determine in the first instance, the *extent* of the government's obligation to pay damages, and in the second, the *existence* of the municipal airport operator's obligation to pay any damages at all. As the federal courts clearly point out, should aircraft fly through the restricted area in such a manner as to constitute a prohibited "taking", then property owners who suffer damage from such overflights have their remedy against the federal government notwithstanding the government's acquired right to prevent obstructions. The same remedy against the airport operator is available to property owners whose land is subject to airport zoning regulations. If takings occur in either situation, just compensation will be paid; and the fact that aircraft flights may occur in the air over the property after the enactment of an airport zoning ordinance has no possible rele-

vance to its constitutionality whether the flights be such as to fall short of a "taking" or not.

Another pertinent aspect of the "obstruction easement" cases is the federal courts' consideration of existing zoning height restrictions of the conventional community development type in determining the extent of the damages to which the landowner is entitled. Thus, the obligation of the United States to pay for an appropriation of air space may be substantially diminished or even extinguished by conventional height restrictions on property imposed by municipalities adjacent to federal airfields. *United States* v. *765.56 Acres of Land*, 164 F. Supp. 942, 947 (E.D. N.Y. 1958), aff'd. 276 F. 2d 264; *United States* v. *72.35 Acres of Land*, 150 F. Supp. 271, 273 (E.D. N.Y. 1957). See also *United States* v. *357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944), where the government's liability was reduced because of an existing local *airport* zoning ordinance.

The Indiana Supreme Court has invalidated a local law in reliance upon the principles of two decisions of this Court which were misapplied to the facts of the case. The court mistakenly viewed the zoning ordinance as a legislative attempt to withdraw from property owners the constitutional rights which had been confirmed in *Griggs* and *Causby*. But these rights were never in danger. The validity of the Gary airport zoning ordinance should not be made to depend upon an independent contingency against which property owners are fully protected.

5. Record Does Not Sustain Overturning the Ordinance

The record in this case discloses neither a claim nor a determination that the Gary airport zoning ordinance contains any features of an arbitrary or unreasonable nature

or that it bears no substantial relation to the public safety. Thus Respondent has not met its most fundamental burden of showing that the ordinance is not a valid police regulation because it offends these constitutional tests prescribed by *Euclid*. Respondent has left the controversy in a posture where, to say the least, the reasonableness of the ordinance is "fairly debatable." And as stated in *Euclid*, where the legislative determination of reasonableness is "fairly debatable, the legislative judgment must be allowed to control."

And only two years ago in rejecting a claim that a local safety ordinance amounted to an unconstitutional taking, the Court reaffirmed the traditional presumption of constitutionality and insisted that it would uphold the ordinance where "the record reveals a dearth of relevant evidence" on the points necessary to evaluate reasonableness. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595.

Furthermore, *Goldblatt* also disposed of any possible argument by the Respondent that while the ordinance might generally be valid, as applied to it the ordinance has a confiscatory effect. In the absence of facts in the record to support such an argument of particular unconstitutional application, the argument will be rejected by this Court. (369 U.S. at p. 595).

Moreover, the possibility that the Respondent could show that as applied to it the ordinance had a confiscatory effect, does not upset the constitutionality of the ordinance as a whole. In the first place, this ordinance contains a severability clause which preserves the enactment generally even if "the application thereof to any person or circumstance are held invalid". (Record, p. 157). Secondly, the Gary ordinance requires that a variance "shall be allowed where a literal enforcement" would act oppressively on

an individual property owner. Under its terms, the Board of Zoning Appeals would grant relief against any unconstitutional deprivation of property. The ordinance leaves no discretion to deny the variance. See *Baggett* v. *City of Montgomery, supra.* Faced with the Gary variance provision, the Indiana Court below merely said:

> "True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful." (Record, p. 214).

On the other hand, no statute need provide for compensation in the case of an unconstitutional application of its provisions. If a property owner's right which has been held to be beyond the exercise of police power is nevertheless to be extinguished, just compensation must be paid. The statute, however, need not spell this out in order to be valid in its application to situations where unconstitutionality is not involved.

But even if this requirement exists, it is satisfied. The Gary airport zoning ordinance was enacted pursuant to state enabling legislation which also specifically conferred on Gary's Board of Aviation Commissioners the power to condemn rights in air space to prevent hazardous obstructions. (Burns' Ind. Stat. § 14-422). If, in the individual instance, the zoning ordinance would operate confiscatorily in a situation where the granting of a zoning variance would not be in the interest of public safety, the Board is authorized to exercise the power of eminent domain to acquire necessary clearance rights upon payment of due compensation. Any requirement that compensation be provided for is more than met by this statutory provision.

The Indiana Supreme Court, far from deferring to the presumption of constitutionality inherent in the ordinance, accorded it instead a strained and unnatural interpretation to support its holding. Such an interpretation constitutes a radical judicial departure from this Court's long-standing rule to construe statutes so as to avoid doubts as to their constitutionality. *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29, 32; *United States* v. *Rumely*, 345 U.S. 41, 45; *United States* v. *Moy*, 241 U.S. 394, 401.

Conclusion

In the present case Respondent has attempted no showing whatsoever with regard to the actual aircraft flights over his property and has therefore not even made the beginning of an argument under *Causby* and *Griggs*. It has not even forged the first link in the specious chain of reasoning which leads through *Causby and Griggs* to the invalidation of the Gary Ordinance on their authority.

By coupling possible aircraft overflights with the height restrictions imposed by the Gary airport zoning ordinance, the Indiana Supreme Court devised what it thought to be a constitutional ground for invalidating the ordinance. But there is a sharp distinction between regulation and use, a distinction which is controlling in this case. The two cannot be melded, but must be treated separately to determine their implications with respect to the validity of airport zoning.

It is therefore respectfully urged that the Court reverse the Judgment of the Supreme Court of Indiana and uphold airport zoning regulations which prevent hazards to the public safety both in the air and on the ground in and around an airport.

The Airport Operators Council, whose membership in-

cludes the operators of publicly owned airports handling approximately 80 per cent of the passengers enplaning and deplaning on scheduled flights in this country, authorizes me to say that the foregoing also express their views.

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BRIEF FOR THE PETITIONER

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners*,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent*.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR PETITIONERS

[redacted]

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110 Daily Cong. Rec. 373, 375-377 (January 14, 1964).. 25
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FAA, Model Airport Zoning Ordinance 13
FAA, Small Airports, 9 (1959) 21
FAA, Technical Standard Order No. N18, "Criteria For Determining Obstruction to Air Navigation" 13, 27, 28
National Airport Plan, Requirements for Fiscal Years, 1963-1967 ..... 32, 35, 37
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Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946) 31, 42
Letter of August 28, 1964, from J.E. Wenzel, Director Illinois Department of Aeronautics 23
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McIntire and Rhyne, Airports and Airplanes and the Legal Problems They Create For Cities, NIMLO Report No. 42 (April 1949) 32, 42
Note, *Zoning—The Airport and the Land Surrounding It in the Jet Age*, 48 Ky. L.J. 273 (1960) 23, 42
Rhyne, Municipal Law, 489 (1957) 22, 42
Rhyne, Airports and the Courts (1944) 23, 33, 42
Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930 ..... 23, 30
Report of the President's Airport Commission, The Airport and Its Neighbors (May 16, 1952) ... 30, 32, 33
Smylie, *Constitutionality of Federal Airport Zoning*, 12 Geo. Wash. L. Rev. 1, 25-30 (1943) 42
Strunck, *Airport Zoning and Its Future*, 50 ABAJ 345 (Apri. 1964) 42
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Indiana, Judge Jackson dissenting, is reported at 193 N.E. 2d 237 (R. 208). No opinion was written by the Porter Circuit Court, Lake County, Indiana.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on October 24, 1963 (R. 217).[1] Its order denying rehearing was entered on December 17, 1963 (R. 217). An order was entered on February 28, 1964 by Mr. Justice Tom C. Clark extending the time for filing a petition for a writ of certiorari to April 15, 1964 (R. 218). The petition for writ of certiorari was granted on May 25, 1964 (R. 219). 377 U.S. 942. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra*, pp. 51-56.

QUESTION PRESENTED

Whether a municipal ordinance which zones property adjacent to a public airport for the purpose of maintaining safe and unobstructed approaches to the airport constitutes a valid exercise of the police power or is a taking of property without compensation in violation of the Fourteenth Amendment of the United States Constitution.

STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949, has the short title of "Airport Zoning Ordinance of the City of Gary" (R. 151-161). The Federal Airport Act, as amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101) is set out in pertinent part in Appendix A, *infra*, pp. 1a-6a. The Indiana Tall Structures Act (5 Burns Ind. Stat. 140-327 *et seq.*, 1963 Cum. Supp.) is set out in full in Appendix

[1] The practice of the Indiana Supreme Court is not to render a judgment separate from the opinion. The directions contained at the conclusion of the opinion constitute the judgment. The directions are executed by the lower court upon certification to it of the opinion.

B, *infra*, pp. 7a-13a. The provision of the Indiana enabling statute pertaining to the adoption of airport zoning by a municipality (5 Burns Ind. Stat. 14-442) is set out in full in Appendix C, *infra*, pp. 13a-15a.

STATEMENT

In October 1939, the City of Gary, Indiana, enacted an ordinance declaring that it needs and shall acquire, improve, operate, and maintain an airport (R. 145-146, 23). On May 29, 1947, the United States granted land to Gary "for and in consideration of the development and operation of the . . . demised premises as a public airport in perpetuity . . . and for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport . . ." (R. 147, 23). Automatic reversion of the title to the United States was provided "if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time . . . , or that after having been so developed the premises have ceased to be used or are necessary for airport purposes" (R. 149). Gary promised that "such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination" (*ibid.*).

The demised land encompassed a triangular area of approximately 610 acres bounded on the south side by the Grand Calumet River (R. 29, 159, 161). The master plan of the airport called for the construction of three runways on this land, an east-west runway, a northwest-southeast runway, and a north-south runway (Pl. ex. 10, R. 56-58). The east-west runway has not been constructed (R. 55). The northwest-southeast runway, planned for a length of 6,000 feet and a

width of 150 feet, has been constructed to a length of 4,600 feet and a width of 100 feet (*ibid.*). The north-south runway, immediately involved in this proceeding, was planned for a length of 3,900 feet and a width of 150 feet (*ibid* It has been constructed to a width of 100 feet; its original length just prior to 1950 was 3,100 feet; this 3,100 feet length was extended in 1954 or 1955 by 300 feet on the north end and 200 feet on the south end; the 300 feet extension at the north end is not part of the master plan; there still remains 600 unconstructed feet at the south end of the runway in accordance with the specifications of the master plan; the north-south runway, which now has a length of 3,600 feet, would have an overall length of 4,200 feet were the 600 feet at the south end constructed as planned (R. 26, 36, 55, 68, 76-77, 78, 81). Federal and municipal funds were expended for this airport construction (R. 31, 68, 193).[2]

In September 1949, before the inception of airport construction, the City of Gary enacted an airport zoning ordinance to regulate and restrict the height of structures and the use of property in the vicinity of the airport (R. 151-161, 56-58). As presently pertinent the operative part of the ordinance provides that (R. 153-154):

> Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered or maintained, in any airport approach zone or airport turning zone to a height in

[2] The Grant Agreement of June 1949 between the City of Gary and the Civil Aeronautics Administration shows that the United States obligated itself in the sum of $166,000 as its initial contribution to the construction of the airport (*infra*, p. 64a). Not in evidence, the Grant Agreement has been obtained from the Federal Aviation Agency, and relevant parts of it are excerpted in Appendix I, *infra*, pp. 63a-73a. Further Grant Agreements were entered into on May 22, 1950, June 28, 1951, and August 12, 1957.

excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) *Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope.* [Emphasis supplied.]

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

All height limits shall begin at elevation of 590 feet above sea level.

The "40 to 1 slope" required by Section 4(c) of the ordinance pertains to "glide angle" or "glide slope". Glide angle or slope is determined as the ratio of horizontal distance to vertical elevation. A 40 to 1 glide angle or slope means 40 feet of forward horizontal distance for one foot of vertical elevation. (R. 73.)

Made part of the ordinance was a detailed zoning map and layout plan (R. 153, 158-161). Exempt from the ordinance was any existing structure and any structure whose construction or alteration had been begun and could with diligence be completed in two years (R. 154). Provision for variance was made if compliance with the ordinance "would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance" (R. 154-155). A detailed hearing procedure was prescribed (R. 155-156).

The preamble to the ordinance stated that "airport hazards endangered the lives and property of

users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investments therein . . ." (R. 151). To overcome these hazards, the preamble stated, the Board of Aviation Commissioners of the City of Gary has "adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land . . ." (R. 152). Accordingly, the preamble concluded, enactment of the ordinance "is necessary in the interest of the public health, public safety, and general welfare," to the end that "creatic or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power . . ." (*ibid.*).

On March 20, 1950, subsequent to enactment of the ordinance, petitioners entered into a 20 year lease, with an option for an additional 10 year period, to operate the airport (R. 162-177, 44). Pursuant to that lease, petitioners expended about $400,000 to build hangars and purchase equipment and facilities for the operation of the general business of the airport (R. 209, 24, 28, 59, 65-66).

This was the situation which prevailed when respondent Indiana Toll Road Commission came on the scene. It constructed a toll road in an east-west direction parallel with the south side of the Gary Municipal Airport approximately at right angles to the north-south runway (R. 24, 46-49, 93, 184-187). The Commission acquired the right-of-way in 1954 and 1955

(R. 50, 68). It completed construction and opened the road for traffic in 1956 (*ibid.*). The road was constructed along the Grand Calumet River which constituted the south boundary of the airport (R. 24, 29, 159, 161). The immediate area to the south of the airport is comprised of marshes (R. 131). The road was constructed partly on the river bed of the Grand Calumet River; the toll road shifted the river bed north a distance varying from 100 to 175 feet; at the point where the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved over the existing south line of the airport property by 175 feet, approximately the width of the river (R. 53-54, 184-185). The road was raised about 30 feet above the surface of the land on which it was built (R. 184-187). The north edge of the road is 1,043 feet south of the existing south end of the north-south runway (or 443 feet from the south end of the proposed but not yet constructed length of the runway, *supra*, p. 4), and is elevated 24.6 feet higher than the south end of the north-south runway (R. 186-187, 100-101).

Under the ordinance the permitted height of structures at the location that the toll road interseets the approach to the north-south runway is 11.08 feet beginning at an elevation of 590 feet above sea level.[3]

[3] The ordinance requires that the height limitation shall be measured "from the end of the proposed runway" (R. 154). The proposed south end of the north-south runway is 443 feet from the north edge of the road. Thus, the present distance between the existing south end of the runway and the north edge of the road is 1,043 feet (R. 186-187, 100), and substracting from this distance the proposed but not yet constructed length of 600 feet at the south end of the runway yields 443 feet (*supra*, p. 4). Applying the 40 to 1 ratio to this 433 feet distance yields 11.08 feet. The ordinance further provides that "All height limits shall begin at elevation of 590 feet above sea level" (R. 154).

Since the land surface at that point of the toll road is 583 feet above sea level (R. 185, 47), thus 7 feet less than the 590 feet beginning mark, the actual permitted height of structures at that place is 18.08 feet (11.08 + 7). As the elevation of the toll road is 612.8 feet above sea level (*ibid.*), and thus at an actual height above the land surface of 29.8 feet (612.8 − 583), the toll road exceeds the permitted height by 11.72 feet and thus penetrates the protected air space by that 11.72 feet. At the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures is 22.45 feet.[4]

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[4] Adding 175 feet to 443 feet gives 618 feet, and applying the 40 to 1 ratio to this distance yields 15.45 feet. Since this height limit begins at 590 feet above sea level and the land surface is at 583 feet above sea level, the actual permitted height elevation is increased by seven feet allowing a height of 22.45 feet above ground level.

The opinion of the court below contains a number of erroneous statements of fact which do not affect the result:

(a) The opinion states that, at the point of intersection, the toll road is "approximately 743 feet south of the south end of said proposed [north-south] runway" (R. 209-210). The correct figure is 443 feet (*supra*, p. 7, n. 3). The court below is under a misapprehension that there are 300 unconstructed feet, rather than 600 unconstructed feet, at the south end of the existing runway (R. 209, see *supra*, p. 4).

(b) The opinion states that "the permitted elevation of structures at the location of the toll road was approximately 18½ feet" (R. 210). The permitted elevation is 18.08 feet.

(c) The opinion states that the toll road projected "itself into the prohibited area about 6½ feet" (R. 210). The actual penetration is 11.72 feet.

(d) The opinion states that "three runways were constructed" (R. 209). The east-west runway has not been constructed (*supra*, p. 3).

The consequence of the penetration of the protected air space was to reduce the glide slope on the aerial approach to the north-south runway from about 38 to 1 to about 27 to 1, causing the north-south runway to be unusable for aircraft grossing 15,000 pounds or more (R. 71-81, 84-87, 88-89, 38-44, 59-64, 66-68). The toll road became the permanent limiting obstruction (R. 38, 53, 71-72, 75, 79, 82, 84). Until the toll road's construction, access to the north-south runway had been limited to a much lesser extent by the catenary system supporting the wires carrying the current that powers the trains of the Chicago South Shore and South Bend Railroad, located about 321 feet south of the toll road (R. 37-38, 41-43, 51-53, 75, 81-82, 100, 185, 187, 189). Obstruction lights had been erected to the south of the catenary system to warn approaching aircraft of its presence, and the lowering or removal of the catenary system would permit the lowering or removal of the obstruction lights as well (*ibid.*, R. 137-138). Negotiations had been in progress to lower the catenary system, and with it the obstruction lights, but these were terminated as futile when the toll road was built (R. 37-38, 51-53, 82). For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstructions (R. 37-38, 41-43, 51-53, 75, 81-82, 137-138).

To secure relief from the harm caused by the impaired use of the north-south runway, petitioners sued in the Porter Circuit Court, Lake County, Indiana, for injunctive relief and damages (R. 1-10). In defense, at the *nisi prius* level, respondent on demurrer to the complaint first took the position that the zoning ordinance "was, as a matter of law, an act done in the exercise of said City's police power"; that it "con-

stituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States"; but that respondent's own action as a "body politic" constituted a supervening exercise of "its politic power" (R. 12). After rejection of this argument by the Circuit Court (R. 13), respondent at trial switched its position to an attack upon the validity of the zoning ordinance on its face, claiming that it was "defective, unenforceable, void and unconstitutional" in that (R. 56):

> . . . the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;
>
> . . . the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary, Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain. . . .

Rejecting this argument, the Circuit Court ruled that (R. 58):

> With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that which immediately rests . . . without the physical boundaries of the airport as established under the statute of 1945.

After trial, while denying injunctive relief, the Circuit Court awarded petitioners a judgment "in the sum of $164,000.00 and costs" (R. 20).

On appeal to the Indiana Supreme Court, that court held that the zoning ordinance was "wholly void. . ." (R. 217). Citing this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, it held that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (R. 212-213). Citing this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, it held that "the taking or appropriating of private property by the government for a specific public use. . . . can be effected only if compensation is provided" (R. 214). Citing this Court's decision in *Village of Euclid* v. *Ambler*, 272 U.S. 365, it held that respondent was under no initial obligation to seek a variance, for no "exhaustion of administrative remedies" is required "when a zoning ordinance is invalid as an entirety" (*ibid.*). And, citing this Court's opinion in *Mugler* v. *Kansas*, 123 U.S. 623, it held that it was free to look through the declaration of policy in the ordinance and treat it as an artifice (R. 215). It therefore invalidated the ordinance on the sole and exclusive ground that it "was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant [respondent here] constructed its toll road" (R. 210).

SUMMARY OF ARGUMENT

I

The central question presented is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. Limitations on land use by zoning is classic regulation within the scope of the police power immune from constitutional attack unless indisputably shown to be arbitrary and unreasonable. Such a showing is precluded by the role of airport zoning in protecting airport approaches from dangerous obstruction hazardous to safe and efficient airport operation.

A.

Airport zoning is designed to protect from encroachment air space needed for safe take-off and landing of aircraft. With the emergence of air transportation Government at all levels has resorted to zoning as one means of meeting its public responsibility to provide airport approach protection. Congress just this year, on March 11, 1964, confirmed the especial appropriateness of zoning to prevent airport hazards. It amended section 11 of the Federal Airport Act to add a new subparagraph (4) requiring that the FAA Administrator obtain from the sponsor of airport development written assurance that:

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal

airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

Congressional endorsement of "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-standing practice. The airport approach standards, measuring the air space surrounding the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the Federal Aviation Agency in Technical Standard Order No. N18, entitled "Criteria For Determining Obstructions To Air Navigation." To secure adherence to these airport approach standards, the "adoption and enforcement of zoning regulations" is one of the means specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe. And the FAA authors a Model Airport Zoning Ordinance for adoption by local government in which the height and zone limits prescribed are based on the application of federal criteria.

Congressional endorsement and FAA practice are rooted in expert studies advocating airport zoning to protect aerial approaches. Zoning fulfills the need of providing unobstructed air space essential to safety. By the same token it protects the immense investment in airports. Money spent on an airport later made partly or wholly useless by encroachments on the air space necessary to its safe operation is money partly or wholly wasted. Airport zoning is therefore imperative if the twofold purpose of maximizing safety and protecting investment is to be adequately served. These ends cannot be achieved by the acquisition of sufficient property interests because the cost is financially prohibitive. It is therefore "vital that there be adequate zoning. . . . Few steps are of such urgency. Few steps

are so essential to promote safety."[5] Promoting safety and preserving investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens."[6]

In this case, the situation of the Gary Municipal Airport precisely fits the federal pattern of municipal development within the aegis of the national system. It is one of the airports which make up the National Airport Plan. The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to this end. The zoning ordinance which Gary adopted in September 1949 was tailored from the then current model ordinance which the Civil Aeronautics Administration had authored in February 1947. The height limits and zones it prescribed were taken directly from the federal criteria then prevailing. And the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport", with automatic reversion of the title to the United States if, the FAA Administrator determines that "the premises have ceased to be used or are neces-

[5] H. Rep. No. 784, 78th Cong., 1st Sess., 11 (1943).

[6] S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963).

sary for airport purposes" (*supra*, p. 3). Finally, not only is the Gary Municipal Airport part of the national system of public airports and the Gary zoning ordinance a reflection of federal planning, but Indiana itself has expressed a state-wide concern for protecting local airports by zoning through adoption of a state zoning procedure applicable where local authority has not enacted airport zoning regulations.

B.

It is within this framework of uniform recognition of the indispensability of airport zoning by those who bear the responsibility of government that it is necessary to consider whether the Fourteenth Amendment stands athwart the airport to paralyze regulatory viability by withholding the power to zone adjacent property to assure compatible land use. By maintaining unobstructed aerial approaches airport zoning fulfills the need for preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. To be sure, while there comes a point at which regulation may cease and become a taking, reasonable airport zoning is well short of that point. Zoning is essential in our crowded society as a means of adjusting conflicting property and community demands. Space, height and use limitations are commonplace and their validity unquestionable. The same need which supports zoning in general supports airport zoning as a particular manifestation of the identical underlying principle.

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of police power, the question reduces to whether the ordinance

in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (R. 217). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. And a full hearing procedure is established.

The provision for variance contained in the ordinance is a built-in safeguard against arbitrary application. It distinctively contributes to the validity of the ordinance on its face and precludes any claim of arbitrary application in the absence of recourse to it. It permits melioration of the ordinance to adjust to unforeseen future developments. And without recourse to this remedy, it cannot be said that the ordinance in actual application would be unreasonable, for the means of determining the ultimate incidence of the ordinance have not been exhausted. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. Yet it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of adjacent property.

The validity of the ordinance on its face is further confirmed by the "inverse condemnation" procedure which Indiana law establishes. Inverse condemnation

is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power. Accordingly, if a variance has been sought and refused, and a limitation placed upon the use of property is later judicially found to be a taking, compensation is obtainable via inverse condemnation. Thus, coupling the ordinance with the statutory procedure for inverse condemnation, a constitutionally invulnerable method of controlling land use is established. Regulation under the police power holds sway until the point of taking is reached and then compensation is provided.

The total abstractness of the attack upon the validity of the ordinance on its face is emphasized by the particular circumstances of the toll road construction. To construct a toll road partly on the river bed, to shift the river bed the width of the river across the edge of an existing property line, and to elevate the road about 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated. To limit the height of a structure at that point is even less demanding than an ordinary setback requirement from a lot line which totally bars any construction within the defined area. Although the record is totally silent on the subject, presumably the toll road was built at the place and height considered to be the most convenient for its construction. But the assumed maximum convenience in constructing the toll road could be served only by distinctly disserving the essential need of the airport. The ordinance, however, had intervened to strike the balance of convenience in favor of the airport, subject to reevaluation in a pro-

ceeding to secure a variance. This is the essence of regulation.

Nothing in *United States* v. *Causby*, 328 U.S. 256, nor *Griggs* v. *Allegheny County*, 369 U.S. 84, upon which much reliance is mistakenly placed, supports the view that an airport zoning ordinance is void on its face because it prescribes height limitations on the use of property surrounding the airport. *Causby* and *Griggs* hold that low flights at frequent intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. These decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. The problems are discrete and their resolution not antagonistic. To say that aircraft cannot be flown so low and so often over terrain without taking an easement requiring compensation does not mean that the Constitution licenses the erection of structures so high as to impair safe and efficient flight.

Invalidation of the ordinance thus rests on the bare premise that ownership of the property of itself precludes zoning to regulate its use. According to the court below, " 'Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (R. 212). But that doctrine can hardly survive its statement. "The police power is one of the least limitable of governmental powers, and in its operation often cuts down

property rights." *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 83. The essence of civilized society is adjustment of competing demands in the use of land and other valuables. This is the traditional function of zoning and airport zoning is no different. The absolutism of the court below is atavistic, and requires rejection in order to maintain governmental viability in assuring through zoning compatible land use between the airport and its neighbors for the good of the community.

II

The decision below does not rest upon a nonfederal ground independent of the federal ground and adequate to support the judgment. It was by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. The least that must therefore be said, giving maximum weight to the possible existence of a state ground, is that the federal and state grounds are inextricably entwined, and hence this Court has jurisdiction because the decision below cannot be ascribed to an *independent* state basis. But even if there were a state ground deemed independent, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. For the decision below, by nullifying airport zoning, is in irreconcilable conflict with federal aviation policy expressed in the Federal Airport Act. A state decision in collision with the premise of a federal statute can hardly rest on a ground to which federal jurisdiction is indifferent. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

ARGUMENT

I. AIRPORT ZONING IS A VALID EXERCISE OF THE POLICE POWER DESIGNED TO ASSURE LAND USE ADJACENT TO THE AIRPORT WHICH IS COMPATIBLE WITH SAFE AND EFFICIENT AIRPORT OPERATION.

Based on the premise that the usable air space above land is property which cannot be taken without compensation, the court below nullifies the airport zoning ordinance on its face, unrelated to any claim or finding of specific arbitrary application, concluding that it is a "wholly void" enactment "invalid as an entirety" (R. 214, 217). The central question therefore is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. The question calls for reconciliation in a contemporary setting of the ancient tension between the police power and eminent domain. *Mugler* v. *Kansas*, 123 U.S. 623, 668-669. The "legislative modification" of the perquisites of property "required from time to time in civilized life" may be effectuated "not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." *Block* v. *Hirsch*, 256 U.S. 135, 155. To be sure, "there comes a point at which the police power ceases and leaves only that of eminent domain" (*id.* at 156), but zoning does not reach that point unless it can be said that the limitations on land use it establishes "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* v. *Ambler Realty Co.*, 272

U.S. 365, 395.[7] If the question whether the legislative "determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable . . . . the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328. For "'debatable questions as to reasonableness are not for the courts but for the legislature'"; "exercise of police power is presumed to be constitutionally valid"; and it "will be upheld if any state of facts either known or which could be reasonably assumed affords support for it." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595, 596.

We therefore turn to a particularized consideration of the role of airport zoning in the protection of airport approaches from dangerous obstructions hazardous to safe and efficient aircraft operations.

A. The Purpose Of Airport Zoning Is To Maintain Safe And Unobstructed Approaches To The Airport.

"Aircraft when taking off or landing : . . need space at the ends of the landing strips, known as 'approach areas,' over which they may safely gain or lose altitude."[8] Airport zoning is directed to this problem. "To protect the public interest in public airports by preventing construction or growth of hazards or obstructions in the approach zones of properly located and constructed airports, municipal, state and federal governments have turned to police power zoning to limit the height of structures and objects of natural

[7] See also, *Reinman* v. *City of Little Rock*, 237 U.S. 171, 177; *Welch* v. *Swasey*, 214 U.S. 91, 105-106.

[8] FAA, Small Airports, 9 (1959).

growth in airport approach zones. A municipality may spend large sums from public funds for the very essential purpose of constructing and maintaining an adequate and safe airport to serve its residents, only to have this airport rendered worthless almost overnight by the erection or growth of some obstruction in the airport's approach zones which prevent full use of the landing facilities there made available at public expense."[9] The origin of airport zoning, its widespread incidence, and the union of municipal, state, and federal authority to further it have been described as follows:[10]

> The first suggestion that zoning should be the answer to the problem of airport approach protection came in 1928 when Alameda County, California adopted an ordinance prohibiting the erection or maintaining of any "structure or obstruction to the operation of aircraft at a height in excess of fifty (50) feet upon unincorporated territory . . . within one thousand (1,000) feet of any boundary of a public air navigation facility . . . within the County of Alameda." In 1929, the Board of Port Commissioners of the City of Oakland, California, adopted a similar ordinance. The federal government through the Civil Aeronautics Authority, as early as 1930 and again in 1938 recognized that airport zoning was the "simplest solution . . . and therefore the most satisfactory way that can be adopted . . . to prevent obstructions in the approaches of airports." The Civil Aeronautics Administration has an established policy of inserting in all grant agreements with cities for expenditure of federal funds on public airports the requirement that the city will prevent

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[9] Rhyne, Municipal Law, 489 (1957).

[10] *Id.* at 489, 490-491.

> obstructions, if possible and within its powers, by zoning, acquisition of property interests, or otherwise.
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> A recent review of state airport legislation reveals that airport zoning acts of one type or another have been adopted in all but eight states. These acts are usually denominated Airport Zoning Acts or Municipal Airport Approach Protection Acts and provide for the promulgation and administration of airport approach zoning regulations by subordinate units of government. Many cities have adopted airport zoning ordinances pursuant to the statutes, and the ordinances are apparently working well. Most of the enabling acts have been written or amended so as to be substantially similar to the 1944 model act formulated by NIMLO [National Institute of Municipal Law Officers] and the Civil Aeronautics Administration.[11]

Illustrating the continuing contemporary significance of airport zoning, approval is expected sometime after October 1, 1964 of airport zoning regulations to protect the Chicago-O'Hare International Airport,[12] the nation's busiest airport.[13]

At the heart of airport zoning is the federal interest in airport approach protection expressed in the Fed-

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[11] The pioneer ordinances of Alameda and Oakland are set out in United States Department of Commerce, Aeronautics Branch, Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, pp. 12-13. For a tracing and summary of some prominent ordinances, see Rhyne, Airports and the Courts, 173-176 (1944). See also, Note, *Zoning—The Airports And The Land Surrounding It in The Jet Age*, 48 Ky. L.J. 273, 279 (1960).

[12] Letter of August 28, 1964, from J. E. Wenzel, Director, Illinois Department of Aeronautics.

[13] FAA Air Traffic Activity, Calendar 1962, 35.

eral Airport Act. The airport approach standards incorporated in zoning ordinances are based directly on federal criteria promulgated by the Federal Aviation Agency. The FAA's authority in the field of airport approach protection derives primarily from the Federal Airport Act and the role ascribed by Congress to the FAA Administrator to propose and annually revise "a national plan for the development of public airports in the United States . . ." (§ 3).[14] "In order to bring about, in conformity with the national airport plan . . . the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics . . ." (§ 4), Congress adopted a grant-in-aid program under which adherence to federal standards is made the condition of the grant of funds. The Act defines as an "Airport hazard" "any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land

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[14] Further authority is conferred by the Federal Aviation Act of 1958 (72 Stat. 731; 49 U.S.C. § 1301). "Navigable airspace" is defined to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft" (§ 101(24)). "In the exercise and performance of his powers and duties under this Act the [FAA] Administrator shall consider the following, among other things, as being in the public interest: . . . (c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both" (§ 103). "The [FAA] Administrator is authorized and directed to develop plans for, formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to assure the safety of the aircraft and the efficient utilization of such airspace" (§ 307(a)). "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ." (§ 1108(a)).

near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft" (§ 2(4)). A "sponsor" in submitting a "project application" for a grant of funds for airport development is required to formulate his proposal "in accordance with standards established by the Administrator, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, *and safety of approaches*" (§ 9, emphasis supplied). More particularly, as a "condition precedent" to approval of the project, "the Administrator shall receive assurances in writing, satisfactory to him," that *inter alia* (§ 11(3)):

> the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards *and by preventing the establishment or creation of future airport hazards*. [Emphasis supplied.]

And, crucially significant, Congress just this year, on March 11, 1964, made explicit the especial appropriateness of zoning as one means to prevent establishment or creation of airport hazards. Thus, Congress added a new paragraph (4) to section 11 of the Act requiring that the Administrator obtain from the sponsor written assurance that:[13]

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent

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[13] Public Law 88-280, § 10, March 11, 1964; H. Conf. Rep. No. 1154, 88th Cong., 2d Sess., in 110 Daily Cong. Rec. 3519 (Feb. 20, 1964); S. Rep. No. 446, 88th Cong., 1st Sess., 2, 3, 20-25 (1963); H. Rep. No. 1002, 88th Cong., 1st Sess., 2, 6, 13 (1963); 109 Cong. Rec. 464S, 15748-49, 15755; 110 Daily Cong. Rec. 373, 375-377 (January 14, 1964).

> reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

As explained by Senator Monroney, Chairman of the Aviation Subcommittee of the Senate Commerce Committee, in requiring assurance of compatible land use by zoning, "the goal is to improve our existing airports, build new airports, and promote safety" (109 Cong. Rec. 15755); it is designed to preclude intrusions by which "airports can be ruined by the construction of high-rise apartments, smokestacks, and similar buildings which encroach on the flight patterns" (*id.* at 15749); and the dominant consideration in zoning is the "safety effect", "safety must take preeminence on any determination."[16] The FAA Administrator similarly stated that in the future administration of the requirement to take appropriate zoning action, as in all matters, "our emphasis is always primarily on safety."[17] And the CAB Chairman observed that "to restrict the use of land adjacent to an airport so as to make it compatible with the operation of the airport should tend to insure greater safety in the operation of aircraft and more comfortable living in areas adjacent to airports."[18]

Legislative endorsement by Congress in 1964 of "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-

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[16] Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 154.

[17] *Id.* at 22.

[18] *Id.* at 28.

standing practice. The airport approach standards, measuring the air space in the vicinity of the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the FAA in Technical Standard Order No. N18 (TSO-N18), dated April 26, 1950, as amended, entitled "Criteria For Determining Obstructions To Air Navigation." In general, with the approximate center of the airport as the reference point and fanning from it at increasingly ascending elevations, the air space at and surrounding the airport is divided into four surfaces with different dimensions and height limits appropriate to the function of each, all designed to provide hazard-free maneuvering space for the landing and take-off of aircraft.[19] For maximum safety no object should penetrate the air space above the prescribed height limitations. And, in determining the needs of aircraft, "it is obviously necessary, in a matter so deeply affecting safety, to provide some general reserve of excess maneuvering space."[20] The normal flight path of aircraft does not abut the defined height limits. "It is significant to note that aircraft are not flown along these imaginary surfaces but are operated above and within the areas protected."[21]

To secure adherence to the airport approach standards prescribed by the FAA, the "adoption and enforcement of zoning regulations" is one of the means

[19] We have not found it possible to compress TSO-N18 in a short compass with accuracy. It appears in full in Appendix D, *infra*, pp. 15a-21a. A nontechnical description of TSO-N18 prepared by FAA personnel appears in Appendix E, *infra*, pp. 23a-27a.

[20] CAA, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 65 (1939). And see, *id.* at 63-71.

[21] Appendix E, *infra*, p. 26a.

specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe (Form FAA-1624, Part III 7, Sponsor Assurances):

> Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace *or by the adoption and enforcement of zoning regulations,* prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended. [Emphasis supplied.]

Furthermore, the FAA authors a Model Airport Zoning Ordinance (Appendix F, *infra*, pp. 27a-47a). In the foreword to the model ordinance, the FAA notes that attached to it is "a copy of Technical Standard Order-N18, which sets forth criteria for determining obstructions to air navigation" (*infra*, pp. 27a-28a). It further observes that, in establishing and defining by ordinance the "various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft", the "size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18" (*infra*, p. 28a). And it advises that its personnel is available to guide in the application of the standards (*ibid.*):

> The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist

> in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

Even with respect to the "runway clear zone," described as "the innermost part of the runway approach area" (14 CFR § 151.9(h)), zoning in lieu of a property interest may be relied upon in the case of "existing airports where improvements are made to runways or landing strips" (*id.* § 151.11(d)) or "where substantial improvements are made that do not benefit a specific runway or landing strip" (*id.* § 151.11(e)), the applicable FAA regulation stating that (*id.* § 151.11(f)):

> If a sponsor or other public agency shows that it is legally able to prevent the future erection or creation of obstructions in the runway clear zone area, and adopts protective measures to prohibit their future erection or creation, that showing is acceptable for the purposes of paragraphs (d) and (e) of this section in place of an adequate property interest. . . . In each case, the sponsor must furnish information as to the specific height limitations established and as to the current and foreseeable future use of the property to which they apply. The information must include an acceptable legal opinion of the validity of the measures adopted, including a conclusion that the height limitations are not unreasonable in view of current and foreseeable future use of the property, and are a reasonable exercise of the police power, together with the reasons or basis supporting the opinion.

Congressional confirmation and FAA practice are rooted in studies advocating airport zoning to protect aerial approaches. In the pioneer study in 1930, the

United States Department of Commerce, Aeronautics Branch, recommended that "municipalities and other political subdivisions . . . exercise the police power in the promulgation of properly coordinated zoning ordinances applying equitably to public airports and intermediate landing fields and to commercial airports of the public utility class, as well as other land uses."[22] In 1939, the Civil Aeronautics Authority reported that "zoning . . . is the simplest solution . . . and therefore the most satisfactory way that can be adopted" to prevent obstructions to aerial approaches, observing in addition that "it is part of the essential fact of the present status of the American airport system that the possibility of safe and efficient use of an airport is entirely dependent on its surroundings. . . ."[23] The so-called "Doolittle Report" to the President in 1952 made "two suggestions" pertaining to aerial approaches: "(1) that certain extensions or over-run areas be incorporated in the airport itself, and (2) that larger areas beyond such extensions be zoned by proper authority, not only to prevent the erection of obstructions that might be harmful to aircraft, but also to control the erection of public and residential buildings as a protection from nuisance and hazard to people on the ground."[24] And the House Committee on Interstate and Foreign Commerce has warned that: "Hundreds of millions of dollars are being spent on airports. But unless an airport can be approached

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[22] Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, p. 9.

[23] CAA, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 33, 34 (1939).

[24] Report of the President's Airport Commission, The Airport and Its Neighbors, 7 (May 16, 1952).

without encountering obstructions the investment therein becomes valueless—or the airport itself becomes a death trap. To protect passengers and flight crews, and to assure that airports can be used in connection with defense of the Nation in time of emergency, it is vital that there be adequate zoning. Unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety."[25]

The indispensability of airport zoning to assurance of safety to persons in the air and on the ground is patent. "The maintenance of an adequate airport system is the single most important factor in insuring air safety. The importance of adequate airport facilities was cogently demonstrated in testimony presented by the Federal Aviation Agency. The agency, in urging continuation of the program, observed that more than two-thirds of all aircraft accidents occur either at or within 5 miles of the airport."[26] "The possibility of an aircraft crashing into one's home is greatest in the narrow, elongated strip of land that underlies the approach zone to runways on airports. Commercial (air carrier) and military planes that have caused death or injury to persons on the ground near airports have,

[25] H. Rep. No. 784, 78th Cong., 1st Sess., 11 (1943). See also, Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946); 2 Yokley, Zoning Law and Practice, 43-45, 61-75 (1953).

[26] S. Rep. No. 446, 88th Cong., 1st Sess., 19 (1963). See also, Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 29, 184; Statistical Review and Resume of Accidents, US Air Carriers, Calendar Year 1960, CAB 1963, 12

in most cases, struck close to the projection of the centerline of the runway and within the approach zone. . . ."[27] "Many accidents to airplanes occur while taking off or landing and one of the greatest single factors to insure safety of air travel today and in the future is that of clearing and keeping clear approaches to airports."[28] "In the exhaustive investigations of the select committee of this House to investigate air accidents and in the inquiries by this committee this year and previously, one of the principal problems in connection with the promotion of safety in air navigation was found to be the matter of regulating the height and location of structures on and in the vicinity of airports."[29]

Airport zoning thus fulfills the need of providing unobstructed air space essential to safety. By the same token it protects the investment in airports. Money spent on an airport later made partly or wholly useless by encroachments on the air space necessary to its safe operation is money partly or wholly wasted. The investment which it is important to safeguard is immense. "Since the federal aid to airport program was first initiated in fiscal year 1947, total expenditures have amounted to $550,939,855."[30] Estimated cost of further development over the next five years is $1,082,439,000 of public funds,[31] with the federal grant-

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[27] Report of the President's Airport Commission, The Airport and Its Neighbors, 21 (May 1952).

[28] Molloy and Rhyne, Airports and Airplanes—Some Legal Problems They Create For Cities, NIMLO Report No. 42, 7 (Apr. 1944).

[29] H. Rep. No. 754, 79th Cong., 1st Sess., 11 (1945).

[30] S. Rep. No. 445, 83d Cong., 1st Sess., 7 (1953).

[31] National Airport Plan, Requirements for Fiscal Years 1963, 1967, 1963 Supplement, FAA, Ex. [illegible], 73 (Mar. 1962).

in-aid program providing for $225,000,000 over the next three years.[32]

Airport zoning is therefore imperative if the two-fold purpose of maximizing safety and protecting investment is to be adequately served. It is no answer to say that the same end can be accomplished by the acquisition of sufficient property interests. For that is a practical impossibility. "Purchase or condemnation by eminent domain proceedings of all land upon which hazards to the use of aircraft may be created is financially impossible in nearly all cases."[33] "The cost of acquisition of sufficient land . . . is frequently beyond the capabilities of a single community."[34] "To purchase outright enough land to make the protection complete would often require that the acreage needed for the landing area proper be multiplied by five or more. . . ."[35] At the Senate Hearings on the 1964 amendments to the Federal Airport Act one knowledgeable person noted that "General Kuhfeld, in a statement he made before the House Interstate and Foreign Commerce Committee, I believe, stated the Air Force conducted a survey to determine the cost of purchasing land around the Air Force installations, and, of course, many times they are farther from the city than the commercial airports, and it would cost something like $6 billion for cities and counties across the country. I can get the exact figures for the committee. But

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[32] Public Law 88-280, § 4, March 11, 1964

[33] Rhyne, Airports and the Courts, 165 (1944).

[34] Report of the President's Airport Commission, The Airport and Its Neighbors, 8 (May 1, 1952)

[35] CAA, Airport Survey, H. Doc. No. 247, 75th Cong., 1st Sess., p. 7986

cities and counties don't have anything like that amount of money to purchase this property around airports."[36] Airport zoning is the alternative that Congress has confirmed and to which local government has resorted. Senator Monroney explained that by requiring assurance of recourse to zoning "the goal is to improve our existing airports, build new airports, and promote safety—*not price our airports out of existence.*"[37] As the Senate Commerce Committee put it, "the committee has no intention of allowing airports to be priced out of existence."[38]

The factors of safety and investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens."[39] Very early, in 1928, Mr. Justice Cardozo presciently observed that:[40]

> Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the noble site

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[36] D. C. Ward, General Counsel, National Association of Counties, in Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 82.

[37] 109 Cong. Rec. 15755 (emphasis supplied).

[38] S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963).

[39] *Id.* at 17.

[40] *Hesse v. Rath*, 249 N.Y. 436, 164 N.E. 342.

> of Byzantium lying at their feet. The need for the vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

"Aviation has added a new dimension to travel and to our ideas."[41] "An airport or safe landing field is a vital and indispensable link in this system of transportation. Our modern airports render a public service similar to other governmental functions which promote the health, comfort and safety of the people and the general welfare of our State and Nation."[42]

In this case, the situation of the Gary Municipal Airport precisely fits the federal pattern of municipal development within the aegis of the national system. It is one of the airports which make up the National Airport Plan; it serves the communities of Gary, Hammond, and East Chicago; and improvements in it to meet civil aviation needs for fiscal years 1963-1967 are considered necessary by the National Airport Plan.[43] The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to that end (Appendix I, *infra*, p. 71a):

> Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any

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[41] Mr. Justice Jackson, concurring in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 302.

[42] *Seaboard Air Line R. Co. v. Peters*, 43 So. 2d 448, 453 (Fla.

[43] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 101 (April 1962).

> land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either *by the adoption and enforcement of a zoning ordinance and regulations* or by the acquisition of easements or other interests in lands or airspace, or by both such methods. . . . The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946 unless otherwise authorized by the Administrator. [Emphasis supplied.][44]

The zoning ordinance which Gary adopted in September 1949 was tailored from the then current model ordinance which the Civil Aeronautics Administration had authored in February 1947 (Appendix G. *infra*, pp. 49a-60a). The height limits and zones it prescribed were taken directly from the federal criteria then prevailing (Appendix H. *infra*, p. 61a). And the federal interest is particularly apparent in that the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such

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[44] Office of Airports Drawing No. 672 was superseded by Office of Airports Drawing No. 814, the latter being incorporated in the presently effective Technical Standard Order N18 as the schematic representation of the obstruction criteria. The Grant Agreement between the City of Gary and the Civil Aeronautics Administration of June 19, 1951, states in paragraph 8(b) that "The Airport Approach Standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 814 dated April 26, 1950 unless [otherwise] authorized by the Administrator".

property as an airport", with automatic reversion of the title to the United States if the FAA Administrator determines that "the premises have ceased to be used or are necessary for airport purposes" (*supra*, p. 3).

Not only is the Gary Municipal Airport part of the national system of public airports and the Gary zoning ordinance a reflection of federal planning, but Indiana itself has expressed a state-wide concern for protecting local airports by zoning. There are 63 airports in Indiana included within the National Airport Plan.[45] In 1957 Indiana enacted a statute known colloquially as the Tall Structures Act and formally entitled "An act to promote safety, welfare and protection of persons and property in the air and on the ground by regulating the height, location and visual identification characteristics of certain structures." 5 Burns Ind. Stat. 14-327 *et seq.* The Act is designed to apply only where no existing airport zoning already obtains, for it is "not [to] apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law. . . ." *Id.* 14-339. The policy underlying this void-filling statute is expressed as follows: "The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern of any public use airport in this state be maintained in a reasonably unobstructed con-

[45] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 99-102 (April 1962); *Id.*, 1963 Supplement, 38-39 (March 1963).

dition for the safe flight of aircraft. To that end, the location and height of structures and the use of land related thereto, is regulated." *Id.* 14-327. The scheme of regulation is to prohibit the erection of structures which exceed specified height limitations unless a permit is obtained (*id.* 14-329); to prohibit the issuance of a permit if certain defined height limitations are exceeded (*id.* 14-330); and, within permissible height limitations, to base the issuance of a permit upon a determination by the Indiana Aeronautics Commission of "a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors." (*id.* 14-333).

The protection of the Gary Municipal Airport by zoning thus typifies the union of federal, state and local authority in resorting to this means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. It is within this framework of uniform recognition of the need by those who bear the responsibility of government that it is necessary to consider whether the Fourteenth Amendment stands athwart the airport to paralyze regulatory viability by withholding the power to zone adjacent property to assure compatible land use.

B. Airport Zoning Is A Constitutional Means Of Regulating Land Use Of Property Adjacent To An Airport.

Hazard-free air space surrounding the airport to provide maneuvering room for the take-off and landing of aircraft is essential to safe and efficient operation. This is datum. Zoning the property adjacent to the airport to maintain unobstructed approaches fulfills the need of preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413. The point at which diminution reaches a magnitude constituting a taking is a question of degree. *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168. "There is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594.

But to say that the question is one of degree does not mean that it is wholly at large. Zoning is indispensable in our crowded society as a means of adjusting conflicting property and community demands. Space, height, and use limitations are commonplace and their validity unquestionable (*Gorieb* v. *Fox,* 274 U.S. 603, 608):

> It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not

> to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. . . . State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Airport zoning is in principle no different. In endorsing it as a valid exercise of the police power, the Florida Supreme Court observed that: "We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use facilities in taking off and landing as well as those living in the vicinity thereof. . . . [W]ell settled principles . . . with reference to . . . zoning apply equally to airport zoning." *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 443 (Fla.). In reaching this conclusion, the court noted that the "airport zoning regulations" before it "conform in all details to the airport approach standards compiled by the Civil Aeronautics Administration of the United States. These standards are the result of many years of experience by the outstanding ex-

perts in the field of aviation and a compliance therewith is a condition precedent to federal aid in airport construction." *Id.* at 444-445. The court therefore upheld an injunction against the erection of a structure which was 13.36 feet in excess of the permissible height limit of 27.64 feet.[46]

The Alabama Supreme Court has similarly sustained the validity of airport zoning. *Baggett* v. *City of Montgomery*, 160 S. 2d 6 (Ala.). The city of Montgomery enacted a zoning ordinance embracing "all land within a radius of two miles of the airport" (*id.* at 7). The ordinance limited the use of designated land to "agricultural uses, horticulture, one-family residences, and flying fields"; it restricted lots for residential purposes to certain sizes; it prohibited apartments and duplex houses; and within a designated district it provided that "no structure or tree shall exceed two and one-half stories or thirty-five (35) feet in height . . ." (*ibid.*). The policy underlying the ordinance was expressed in virtually the same terms as the Gary ordinance (*id.* at 8). And provision for variance was made in virtually the same terms as the Gary ordinance (*id.* at 9). The court held that the ordinance had a valid scope for operation on its face and that it could not therefore be illegalized because of anticipated arbitrary application in particular circumstances. Said the court (*id.* at 8):

> In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did

[46] See also, *Waring* v. *Peterson*, 137 So. 2d 268 (Fla. Ct. App.), validating an airport zoning ordinance which in part prescribes a 30 foot height limitation in the aircraft approach zones at the end of the runways.

> a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided the restrictions were in whole or in part reasonably related to all or part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act.

The court further observed that the provision for variance, and the adequate hearing procedure in conjunction with it, sufficiently safeguarded against arbitrariness (*id.* at 8-9).[47]

And informed commentators have likewise uniformly held the view that reasonable airport zoning is valid.[48]

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[47] Other cases pro and con, whether by holding, dictum, or implication, are in general not illuminating, and are collected in Rhyne, Municipal Law, 490 (1957), and Anno., 77 A.L.R. 2d 1355, 1362-64. See also, for decisions adverse to airport zoning, *Roark* v. *City of Caldwell* 33 U.S. Law Week 2089 (Idaho S. Ct., July 30, 1964); *Sneed* v. *County of Riverside*, 219 ACA 221, 32 Cal. Rep. 318.

[48] Strunck, *Airport Zoning And Its Future*, 50 ABAJ 345 (April 1964); Rhyne, Municipal Law, 491 (1957); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 554 (1946); Rhyne, Airports and the Courts, 164-190 (1944); Note, *Zoning—The Airport And The Land Surrounding It In The Jet Age*, 48 Ky L.J. 273 (1960); Manion, Law of the Air, 77 (1950); McIntire and Rhyne, Airports and Airplanes and the Legal Problems They Create for Cities, NIMLO Report No. 42, 14-19 (April 1949); Smylie, *Constitutionality of Federal Airport Zoning*, 12 Geo. Wash. L. Rev. 1, 25-30 (1943).

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of the police power, the question reduces to whether the ordinance in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (R. 217). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. They precisely conform indeed to the airport approach standards which had been promulgated by the Civil Aeronautics Administration when the ordinance was enacted (Appendix H, *infra*, p. 61a). At the same time that safe access to the airport is assured, the interest of the adjacent property owner is carefully accommodated. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. And a full hearing procedure is established.

The provision for variance contained in the ordinance bears special stress. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. Yet it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of the adjacent property. By this failure respondent precluded itself from asserting anything but the invalidity of the ordinance on its face in the abstract. For while a zoning ordinance like any legislation impeccable on its face may be arbi-

trarily applied, there can be no claim of specific arbitrary application without first having sought a variance essential to the determination of the ultimate incidence of the ordinance. Cf., *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395-397. Until a variance is sought and refused the actual application of the ordinance is unknown and unknowable. Requiring that a variance be sought is therefore more than the customary obligation to exhaust administrative remedies as a matter of procedural propriety. *Cf., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-52. More fundamentally, the specific substantive impact of the ordinance cannot be ascertained until the procedure for variance has been invoked and completed. If the variance is granted, the matter ends. This eventuality emphasizes that, if "an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." *Public Utilities Com.* v. *United States*, 355 U.S. 534, 539-540. And since there can be no assumption that a variance which should be granted will be withheld, one who "has failed to make the required application . . . is not at liberty to complain because of his anticipation of improper or invalid action in administration." *Smith* v. *Cahoon*, 283 U.S. 553, 562. Finally, the question whether in application a particular limitation upon the use of property constitutes regulation or a taking, involving as it does nice considerations of degree and balance, "turns almost wholly upon the facts to be found"; therefore, the forum created by the legislation to try the issue whether the limitation should be maintained or lifted is clearly the most appropriate to conduct the inquiry initially and therefore recourse to it is obligatory. *Cf., Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 228-232. See also, *Laurel Hill Cemetery* v. *City*

of San Francisco, 216 U.S. 358, 364-365. The upshot is that the provision for variance is a built-in safeguard against arbitrary application which distinctively contributes to the validity of the ordinance on its face and precludes any claim of arbitrary application in the absence of recourse to it.

A further factor serving to validate the ordinance on its face is the "inverse condemnation" procedure which Indiana law establishes. As part of its statutory procedure for the assessment of damages in eminent domain proceedings, Indiana provides that "Any person having an interest in any land which has heretofore been or may hereafter be taken for any public use without having been first appropriated under this or any prior law may proceed to have his damages assessed under this act, substantially in the manner herein provided." 2 Burns, Ind. Stat. 3-1711 (1946 Repl.). This provides a remedy against an uncompensated taking by the bringing of an "inverse condemnation" action. "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Martin* v. *Port of Seattle*, 391 P. 2d 540, 542, n. 1 (Wash.). Accordingly, if a variance has been sought and refused, and a limitation placed upon the use of property by the ordinance is later judicially found to be a taking, compensation is obtainable via inverse condemnation. Thus, coupling the ordinance with the state statutory procedure for inverse condemnation, a constitutionally invulnerable method of controlling land use is established. Regulation under the police

power holds sway until the point of taking is reached and then compensation is provided.[49]

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[49] The court below concludes, however, that compensation via inverse condemnation is irrelevant because the ordinance is "wholly void" (R. 217). But one element in determining whether or not the ordinance is "wholly void" is the availability of compensation. In reality, therefore, the court below concludes that the ordinance is unconstitutional by disregarding that which serves to make it constitutional. The vice in the approach of the court below is glaringly revealed by its identical disposition of the relevance of the procedure for variance. It states that: "True, the ordinance provided that an aggrieved land-owner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety" (R. 214). But there was provision for compensation via inverse condemnation which the court below chose to ignore. And to conclude that the ordinance "is invalid as an entirety", and for that reason no account need be given to the provision for variance, is to have made a judgment of unconstitutionality in isolation from an important element germane to showing constitutionality.

The other reason advanced by the court below for disregarding inverse condemnation is simply illogical. It states that: "In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which are adjacent to, parallel with, are much higher than the toll road complained of" (R. 216-217). But the court below had earlier found a taking—indeed, this was the whole basis of its decision—in the limitation upon the height of structures imposed by the ordinance at the place of the toll road construction. Thus, to hold the ordinance unconstitutional, the court below found a taking without compensation, and to deny the availability of compensation, it found that there was no taking! The reference to the power lines (the catenary system) is in any event besides the point. As shown (*supra*, p. 9), the catenary system was a nonconforming use which preexisted the ordinance, and negotiations to lower it had been in progress but were terminated as futile when the toll road was built. For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstruction.

The total abstractness of the attack upon the validity of the ordinance on its face is emphasized by the particular circumstances of the toll road construction. As shown (*supra,* p 7), the Grand Calumet River divides the south boundary of the airport property from the north boundary of the toll road property. The river is the boundary. The land immediately south of the airport is marsh. The toll road was not simply built on the river edge of the property line. It was in fact constructed partly on the river bed itself. The toll road shifted the river bed north a distance varying from 100 to 175 feet. At the point that the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved over the south line of the airport property by 175 feet, approximately the width of the river. And the toll road was not built on the surface of the land. It was elevated about 30 feet above the surface of the land.

To construct a toll road partly on the river bed, to shift the river bed the width of the river across the edge of an existing property line, and to elevate the road about 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated. To limit the height of a structure at that point is even less demanding than an ordinary setback requirement from a lot line which totally bars any construction within the defined area. Although the record is totally silent on the subject, presumably the toll road was built at the place and height considered to be the most convenient for its construction. There is, however, not a snip of a suggestion—again the record is totally silent—that it had to be built in that very place and at that very height or not at all, or that a shorter height and a more southerly route

could not have been proportioned to each other to comply with the ordinance and suit the road about as well. And the assumed maximum convenience in constructing the toll road could be served only by distinctly disserving the essential need of the airport. But the ordinance had intervened to strike the balance of convenience in favor of the airport, subject to reevaluation in a proceeding to secure a variance. This is the essence of regulation. It can be judicially undone only if it is devoid of rationality. That cannot possibly be said of the adjustment the ordinance encases. Toll road construction is not bucolic land use. This is no dirt road on the surface of the land used by a farmer to carry his milk to the dairy or his grain to the barn.

Nothing in *United States* v. *Causby*, 328 U.S. 256, nor *Griggs* v. *Alleghany County*, 369 U.S. 84, upon which much reliance is mistakenly placed, supports the view that an airport zoning ordinance is void on its face because it prescribes height limitations on the use of property surrounding the airport. *Causby* and *Griggs* hold that low flights at frequent intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. These decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. The problems are discrete and their resolution not antagonistic. Airport zoning deals with interference with landing and take-off of aircraft caused by structures too high for safe operation. *Causby* and *Griggs* deal with interference with surface use of land caused by low-flying aircraft. Thus, a structure may not be erected in excess of a prescribed

height limit—that is airport zoning. Below that height limit structures may be freely built, and whoever is responsible for flying aircraft so low and so often over such structures as substantially to destroy their utility is liable for payment for the taking—that is *Causby* and *Griggs*. Put another way, airport zoning still allows ample land use below the defined height limits, and *Causby* and *Griggs* protect such land use by their holding that low and frequent flights drastically impairing utilization of the property work a compensable taking. In short, airport zoning regulates the upward reach of structures; *Causby* and *Griggs* place limitations on the uncontrolled downward reach of aircraft. To say that aircraft cannot be flown so low and so often over terrain without taking an easement requiring compensation does not mean that the Constitution licenses the erection of structures so high as to impair safe and efficient flight.

In this case all that is presented is excessive height of structures. There is not a word in this record concerning low and frequent aircraft flights, and therefore no possible predicate for invoking *Causby* and *Griggs*. It cannot be assumed that to make air space hazard-free by zoning automatically results in a burdensome incidence of low and frequent flight through that air space. Traffic may be heavy or light, or high or low, or interfere or not with enjoyment of the land below. The condition one way or another cannot be supposed. For example, aircraft passing over the toll road in a north-south direction can hardly be presumed to interfere with auto traffic speeding in an east-west direction on the road below. Should excessive and interfering air use develop it can be dealt with when it happens. To prevent oppressive land use by zoning does not of

itself cause or countenance oppressive air use reached by *Causby* and *Griggs*.

Invalidation of the ordinance thus rests on the bare premise that ownership of the property of itself precludes zoning to regulate its use. It is this proposition which is the sole ground upon which the court below bases its holding that the ordinance is a "wholly void" enactment "invalid as an entirety" (R. 214, 217). According to it, " 'Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (R. 212). This thesis is diametrically opposed to that on which Congress acted when it confirmed recourse to airport zoning as a central element of federal aviation policy (*supra*, pp. 25-26). For Congress endorsed zoning for the very reason that it was designed to prevent airports from being "ruined by the construction of high-rise apartments, smokestacks, and similar buildings which encroach on the flight patterns" (109 Cong. Rec. 15749). The court below is deceived by an ancient fallacy. "'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed.' *Block* v. *Hirsch*, 256 U.S. 135, 155. But rights in property are not immutable. "Such words as 'right' are a constant solicitation to fallacy." *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31. "Ownership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506. The "extent to which legislation may modify and restrict the use of property consistently with the Constitution

is not a question for pure abstract theory alone." *Laurel Hill Cemetery* v. *City of San Francisco*, 216 U.S. 358, 366. "Practical lines have to be drawn, and distinctions of degree must be made." *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 616. "The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 83. The essence of civilized society is adjustment of competing demands in the use of land and other valuables. This is the traditional function of zoning and airport zoning is no different. The absolutism of the court below is atavistic. *Ferguson* v. *Skrupa*, 372 U.S. 726, and requires rejection in order to maintain governmental viability in assuring through zoning compatible land use between the airport and its neighbors for the good of the community, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 303. The judgment below condemns the ordinance as "void, root and branch. That judgment must be reversed." *Block* v. *Hirsch*, 256 U.S. 135, 158.

II. THE DECISION BELOW DOES NOT REST UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The decision below does not rest upon a "'non-federal ground . . . independent of the federal ground and adequate to support the judgment.'" *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281. While respondent contended that the ordinance violated both the state and federal constitutions (R. 56, 210), and the court below quoted the relevant provisions of both in a footnote in its opinion (R. 211, n. 1), at every critical juncture of its analysis the court below invoked and quoted this Court's decisions as the foundation of its reasoning (*supra*, p. 11), and at no stage did it

specify the state constitution as the grounding for its ultimate conclusion that "the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation" (R. 216). The federal source of law underpinning the decision below is especially denoted by its prominent reliance on *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84 (R. 212-213). *Causby* and *Griggs* importantly construed the Federal Constitution, the Civil Aeronautics Act, the Federal Airport Act, and federal regulations. And the inherently federal character of any question of the constitutionality of airport zoning is further apparent from the fact that full account of federal aviation policy is essential to its informed determination.

It was thus by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. Without the influence of necessary obedience to this Court's views, there is no saying that the court below would have arrived at the result it did. For it would be pointless for it to conclude that the ordinance was valid under the state constitution if it must in any event fall under the federal constitution. And there is no suggestion that the state constitution, which has identity of scope with the federal constitution, has been given a different construction. *Cf., Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556-557. Since the premises for the decision below are derived from the compulsion of this Court's opinions, its federal orientation precludes ascribing to that decision an *independent* state basis. Hence, giving maximum weight to the possible existence of a state ground, it is inextricably entwined with the

federal ground, and the least that must therefore be said is that the "two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law." *State Tax Commission* v. *Van Cott,* 306 U.S. 511, 514. In that posture, "where the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irr. District* v. *Farmers Mut. Canal Co.,* 243 U.S. 157, 164. See also, *Abie State Bank* v. *Bryan,* 282 U.S. 765, 773. At the minimum, assuming there is room at all for autonomous state decision free of federal law, since the court below "held as it did because it felt under the compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion." *Missouri* v. *Mayfield,* 340 U.S. 1, 5. See also, *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S.437, 443, 448-449; *Rayonier, Inc.* v. *United States,* 352 U.S. 315, 320-321.

There cannot in any event be a state decision of the constitutional question which can be validly reached free of federal law. A state ground for decision must be both independent and adequate.[50] In this case, if there were an existing state ground which could be deemed an independent basis of decision, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total

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[50] *Fay* v. *Noia,* 372 U.S. 391, 428-430.

nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme. Accordingly, the consequence of a conclusion that the ordinance had been invalidated upon an independent state constitutional ground would be to bring the decision below into collision with federal aviation policy expressed in the Federal Airport Act and to require its supersession under the Supremacy Clause. "[I]t is 'familiar doctrine' that the federal policy 'may not be set at nought, or its benefits denied,' by the state law." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229.[51]

The court below faced the relevance of federal aviation policy when it concluded, albeit erroneously, that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (R. 216). Respondent had indeed urged in the court below that its claim of unconstitutionality was compatible with federal aviation policy.[52] There is, therefore, no escape from the federal question. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

To illustrate concretely, the inevitable consequence of the decision below is to restrict the means available to protect aerial approaches to acquisition of property

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[51] See also, *Pennsylvania* v. *Nelson*, 350 U.S. 497; *Hill* v. *Florida*, 325 U.S. 538; *Cohens* v. *Virginia*, 6 Wheat. 264, 414 ("The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void.").

[52] Respondent's brief in the court below, p. 242. All briefs below have been certified by the clerk of the Indiana Supreme Court and lodged with the clerk of this Court.

interests by purchase or condemnation. That means is financially prohibitive. The "adoption of zoning laws" which Congress has only this year explicity confirmed as a central element of federal aviation policy is the federally-prescribed alternative to excessive cost. As the Senate Commerce Committee stated, "the committee has no intention of allowing airports to be priced out of existence." S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963). Contrary to the federal scheme the decision below prices airports out of existence in Indiana.

The end to be served is thus crippled. So too is the means chosen to achieve it. For the decision below makes operation of the federal scheme impossible. The predicate of the Federal Airport Act is that local government has the power to zone property adjacent to a public airport to assure compatible land use. As explained by the FAA Administrator in a letter quoted with approval in the Senate Report (S. Rep. No. 446, 88th Cong., 1st Sess., 22 (1963)):

> This power [to zone the land around airports] reposes in the State and its political subdivisions. If the airport sponsor lacks this authority because the airport is located outside the city limits, the neighboring city or county does not lack the authority. If neighboring jurisdictions refuse to exercise this authority for the welfare of their own citizens, the State could act. We have reached the point where we should insist upon an acknowledgement that achieving compatible land use in the vicinity of airports is a governmental responsibility which must be assumed at some jurisdictional level within the State.

The potent financial incentive of the grant-in-aid program is the federal means used to activate exercise of the power which it is taken for granted does exist. Judicial nullification of the fact of power immobilizes

the federal scheme. Extension of judicial nullification to a few key states like California, Illinois and New York would bring the National Airport Plan to a standstill. Since the premises of the Federal Airport Act are that (1) local power to zone exists, and that (2) federal financial stimulus can be reliably expected to activate the exercise of that power, judicial denial of the existence of any power which can be energized is totally inconsistent with the federal scheme. A state decision in conflict with a federal predicate can hardly rest on an adequate and independent state ground.

These considerations preclude a view that there exists a state ground independent of the federal ground adequate to support the judgment.

CONCLUSION

For the reasons stated the judgment should be reversed.

Respectfully submitted,

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APPENDIX A

Excerpts from Federal Airport Act, as Amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101)

SEC. 2. As used in this Act—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(3) "Airport development" means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport passenger or freight terminal buildings and other airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars.

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(5) "Project" means a project for the accomplishment of airport development with respect to a particular airport.

• • •

(7) "Public agency" means the United States Government or an agency thereof; a State, or Puerto Rico, the Virgin Islands, and Guam, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization.

(8) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(9) "Sponsor" means any public agency which, either individually or jointly with one or more other public agencies, submits to the Administrator, in accordance with this Act, an application for a grant of funds for airport development.

* * *

NATIONAL AIRPORT PLAN

Formulation of Plan

SEC. 3. (a) The Administrator is hereby authorized and directed to prepare, and thereafter, at least three months prior to the close of each fiscal year, to revise, a national plan for the development of public airports in the United States, including Puerto Rico and the Virgin Islands. Such plan shall specify in terms of general location and type of development, the projects considered by the Administrator to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, which projects shall include all types of airport development eligible for Federal Aid under this Act and shall not be limited to any classes or categories of public airports. In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, the probable growth and requirements of civil aeronautics, and such other considerations as he may deem appropriate, and shall to the extent feasible, consult, and give consideration to the views and recommendations of the Civil Aeronautics Board, the

States, Puerto Rico and the Virgin Islands, and their political subdivisions, and shall, to the extent feasible, consult and give consideration to the views and recommendations of, the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by construction or operation of any radio station. In carrying out this section the Administrator is authorized to make such surveys, studies, examinations, and investigations as he may deem necessary.

* * *

FEDERAL-AID AIRPORT PROGRAM

SEC. 4. (a) In order to bring about, in conformity with the national airport plan prepared and from time to time revised as provided in this Act, the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized, within the limits of the obligation authority provided in section 5 to make grants of funds to sponsors for airport development and for advance planning and engineering therefor as hereinafter provided.

Announcement of Program

(b) It shall be the duty of the Administrator to make public by January 1 of each year the proposed program of airport development intended to be undertaken during the fiscal year next ensuing, and he may revise such program to the extent he finds necessary to accomplish the purposes of this Act.

* * *

SUBMISSION AND APPROVAL OF ADVANCE PLANNING AND ENGINEERING PROPOSALS AND PROJECTS

Submission

SEC. 9. (a) Subject to the provisions of subsections (b) and (c) of this section, any public agency, or two or more

public agencies acting jointly, may submit to the Administrator an advance planning and engineering proposal or a project application in such form, and containing such supporting information, as may be prescribed by the Administrator and setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport plan formulated by the Administrator under this Act, and all such proposed development shall be in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, and safety of approaches.

* * *

PROJECT SPONSORSHIP

SEC. 11. As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities

and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this Act, as he may deem necessary. Among other steps to insure such compliance the

Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at Federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this Act to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

GRANT AGREEMENTS

SEC. 12. Upon approving an advance planning and engineering proposal or a project application, the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the advance planning and engineering proposal or project application an offer to pay the United States share of the planning and engineering costs or allowable project costs. Any such offer shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this Act and the regulations prescribed thereunder. Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this Act, and shall stipulate the obligations to be assumed by the sponsor or sponsors. If and when any such offer is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting, and thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. Unless and until such a grant agreement has been executed, the United States shall not pay, nor be obligated to pay, any portion of the costs which have been or may be incurred.

APPENDIX B

Indiana Tall Structures Act (5 Burns Ind. Stat. 14-327 et seq. 1963 Cum. Supp.)

14-327. *Public use airport—Unobstructed conditions for safe flight.*—The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated. [Acts 1957, ch. 23, § 1, p. 37.]

14-328. *Definitions.*—As used in this act [§§ 14-327—14-341], unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and

not for profit, religious corporations, municipal corporations and bodies politic. [Acts 1957, ch. 23, § 2, p. 37.]

14-329. *Permit required to erect, add to the height of or replace structure near public use airport.*—Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred [1,500] feet on either side of the extended center line of a runway or landing strip for a distance of two [2] miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty [150] feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand [3,000] feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one [1] foot vertically to every twenty [20] feet horizontally measured from such nearest boundary;

(b) at any other place within this state which will result in a structure extending more than five hundred [500] feet above the highest point of land within a one [1] mile radius from such structure. [Acts 1957, ch. 23, § 3, p. 37.]

14-330. *Excessive height—Restrictions—Issuance of permit.*—No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one

thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty [50] feet above the height of the highest structure in existence on the effective date of this act [§§ 14-327—14-341] which is within a distance of one [1] mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected [affected] by the provisions and requirements of section 3(a) [§ 14-329] of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty [30] days prior to any work, construction, or installation on the proposed structure. [Acts 1957, ch. 23, § 4, p. 37.]

Compiler's Note. The bracketed word "affected" was inserted by the compiler.

14-331. *Application for permit.*—Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right that to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specif-

ically or within a definite area, and also the maximum height allowed for a structure. [Acts 1957, ch. 23, § 5, p. 37.]

14-332. *Visual identification characteristics specified in permit.*—Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit. [Acts 1957, ch. 23, § 6, p. 37.]

14-333. *Investigation of application for permit—Notice of determination—Hearing, request of applicant for—Apperance of partics.*—Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act [§§ 14-327—14-341]. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not issue or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the appli-

cation. Such determination shall become final twenty [20] days after notification thereof is served unless the applicant, within such twenty [20] day period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent. [Acts 1957, ch. 23, § 7, p. 37.]

14-334. *Conduct of hearing.*—Any hearing conducted pursuant to the purposes and provisions of this act [§§ 14-327—14-341] shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended [§§ 14-312—14-325]. [Acts 1957, ch. 23, § 8, p. 37.]

14-335. *Action of commission—Procedure for appeal and judicial review.*—Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure. [Acts 1957, ch. 23, § 9, p. 37.]

14-336. *Order to show cause why application for permit need not be obtained—Date for hearing.*—In any instance where the commission learns or has reasonable grounds to believe that any person is erecting or adding to a structure that would be subject to the provisions of this act [§§ 14-327—14-341] but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order. [Acts 1957, ch. 23, § 10, p. 37.]

14-337. *Remedies of commission—Enforcement of law, and rules, regulations or orders of commission.*—In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions

of this act [§§ 14-327—14-341] or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto. [Acts 1957, ch. 23, § 11, p. 37.]

14-338. *Rules and regulations, adoption and promulgation by commission—Administrative forms furnished by commission.*—The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act [§§ 14-327—14-341.]

The commission shall prescribe and furnish forms necessary for the administration of this act. [Acts 1957, ch. 23, § 12, p. 37.]

14-339. *Exemption of area covered by airport zoning regulations—Change in height or location of prior structure.*—This act [§§ 14-327—14-341] shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act. [Acts 1957, ch. 23, § 13, p. 37.]

14-340. *Existing buildings or structures—Radio towers—Railroads—Application of law.*—The provisions of this act [§§ 14-327—14-341] shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by

railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof [§ 14-329]. [Acts 1957, ch. 23, § 14, p. 37.]

14-341. *Penalty for violation.*—Whoever violates or fails to comply with the provisions of this act [§§ 14-327—14-341] is punishable by a fine of not less than ten dollars [$10.00] nor more than five hundred dollars [$500]. Each day that such violation or failure continues is a separate offense. [Acts 1957, ch. 23, § 15, p. 37.]

APPENDIX C

The Provision of the Indiana Enabling Statute Pertaining to the Adoption of Airport Zoning by a Municipality (5 Burns Ind. Stat. 14-422)

14-422. *Air space—Zoning—Condemnation—Effect—Regulations.*—In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act [§§ 14-412—14-433], such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this

act [§§ 14-412—14-433], the right to prevent the erection of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structure above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act [§§ 14-412—14-433] shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act [§§ 14-412—14-433]. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable. [Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252.]

Amendments. The 1949 amendment substituted the word "council" for the words "governing authority" following the words "as provided by law, by the" in the first sentence. The amendment inserted the present third paragraph in the section.

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
OFFICE OF THE ADMINISTRATOR OF CIVIL AERONAUTICS
WASHINGTON 25, D. C.

TSO-N18
April 26, 1950

[As amended by Amendment 1, July 30, 1952.
Amendment 2, May 5, 1960]

Technical Standard Order

SUBJECT: CRITERIA FOR DETERMINING OBSTRUCTIONS TO AIR NAVIGATION

INTRODUCTION

In order to provide a uniform criteria for determining obstructions to air navigation, this standard has been developed by the Civil Aeronautics Administration in con-

junction with the Federal Communications Commission, the Department of Defense, and appropriate branches of the aviation and broadcasting industries.

DIRECTIVE

In accordance with the procedure for establishing technical aeronautical standards specified in Administrative Order No. 56, dated August 2, 1946, and Standard Practice No. 6370, the "Criteria for Determining Obstructions to Air Navigation" set forth below and as schematically shown on CAA Office of Airports Drawing No. 814 is established as a Technical Standard Order.

This standard is the official Civil Aeronautics Administration guide for determining obstructions to air navigation and supersedes all existing obstruction criteria which do not conform to its requirements.

SPECIFIC INSTRUCTIONS

PROCEDURE FOR DETERMINING OBSTRUCTIONS. Objects which project above the landing area or any of the airport referenced imaginary surfaces described in Section A shall be considered obstructions to air navigation. Objects exceeding the limiting heights above ground described in Section B shall be considered obstructions to air navigation unless found not to be objectionable after special aeronautical study. Objects which are located or will be located with respect to other objects of a permanent character such that there results no material increase in the aeronautical hazard will not be considered obstructions.

A. AIRPORT REFERENCED IMAGINARY SURFACES. These imaginary surfaces are established by reference to the airport as described below and consist of the approach surfaces, horizontal surface, conical surface, and transitional surfaces.

A.1. *Approach Surfaces.* The approach surface is an inclined plane located directly above the approach area.

The dimensions of the approach area are measured horizontally.

A.1.a. *Length.* The approach area has a length of 10,000 feet beginning 200 feet outward from the end of each runway and extending outward, ending at a point 10,200 feet from the end of the runway on the extended center line of the runway. In addition, the approach areas of all runways which may be used for instrument operation shall extend outward an additional 40,000 feet. The approach area requirements for instrument runways shall apply to all runways which may be used for instrument operations and to both ends of such runways.

A.1.b. *Width.* The approach area is symmetrically located with respect to the extended runway center line, and for all instrument runways has a total width of 1000 feet at the end adjacent to the runway. The approach area flares uniformly to a total width of 4,000 feet at the end of the 10,000 foot section and to a total width of 16,000 feet at the end of the additional 40,000 foot section. For all other runways not intended for instrument operation, the approach area has a total width at the end adjacent to the runway, and at the approach end respectively as follows: for Trunk Air Carrier Service as indicated in Technical Standard Order TSO-N6b, and larger airports, 500 feet and 2,500 feet; for Local Air Carrier Service airports, 400 feet and 2,400 feet; for Secondary airports, 250 feet and 2,250 feet.

A.1.c. *Slope.* For instrument runways the slope of the approach surface along the runway center line extended is 50:1 for the inner 10,000 foot section and 40:1 for the outer 40,000 foot section. For all other runways, not intended for instrument operation, which meet or exceed the minimum runway length requirements for Local Air Carrier Service specified in TSO-

N6b, the slope is 40:1. On airports with shorter runway lengths than those specified for Local Air Carrier Service the slope of the approach surface is 20:1 for all runways.

A.2. *Horizontal Surface.* The horizontal surface is a plane, circular in shape, with its height 150 feet above the established airport elevation and having a radius from the airport reference point as indicated in the following table:

Intercontinental Airports	13,000 feet
Continental Airports	11,500 feet
Trunk Airports	10,000 feet
Local Airports	7,000 feet
Secondary airports	5,000 feet

Except for Secondary these airports are defined in TSO-N6b. The established elevation of an airport is the elevation of the highest point of the usable landing area. The airport reference point is a point selected and marked at the approximate center of the airport landing area.

A.3. *Conical Surface.* The conical surface extends upward and outward from the periphery of the horizontal surface with a slope of 20:1 measured in a vertical plane passing through the airport reference point. Measuring radially outward, from the periphery of the horizontal surface, the conical surface extends for a horizontal distance of 7,000 feet for Intercontinental, Continental Airports, 5,000 feet for Trunk and Local Airports, and 3,000 feet for Secondary airports.

A.4. *Transitional Surfaces.* The transitional surfaces are inclined planes with a slope of 7:1 measured upward and outward in a vertical plane at right angles to the center line of the runway. The transitional surfaces, symmetrically located on either side of the runway, extend upward and outward from a line on either

side of the runway which is parallel to and level with the runway center line. These parallel lines are at a horizontal distance from the runway center line equal to one-half of the minimum width of the approach area indicated in A.1.b. above. Transitional surfaces extend from the edges of all approach surfaces upward and outward to the intersection with the horizontal surface, or the conical surface. The approach surfaces for instrument runways projecting through and beyond the limits of the conical surface have a 7:1 transitional surface extending a distance of 5,000 feet measured horizontally from the edge of the approach surfaces and at right angles to the runway center line.

B. Limiting Heights Above Ground. In addition to the requirements in Section A above, objects shall be considered obstructions to air navigation (unless special aeronautical study indicates otherwise) if they are more than 500 feet above ground or fall in the following categories:

B.1. Objects in instrument approach areas, more than 100 feet above the ground or 100 feet above the elevation of the approach end of the runway, whichever gives the higher elevation of the object, within three statute miles of the runway end, and increasing in height above ground in the proportion of 25 feet for each additional statute mile of distance outward from the runway end but not to exceed 250 feet within ten statute miles of the runway end.

B.2. Objects more than 170 feet above the ground or more than 170 feet above the established airport elevation, whichever gives the higher elevation of the object, within three statute miles of the reference point of a local or larger class airport, and increasing in height in the proportion of 100 feet for each additional mile of distance from the airport but not to exceed a maximum of 500 feet above ground.

B.3. Objects whose elevation would increase the final approach minimum flight altitude. The final approach minimum flight altitude is normally established from the highest point within five statute miles of the center line of the final approach course of a radio facility used for final let-down to an airport, and extends for a distance of ten statute miles along this course outward from the radio facility. The radio facility may be a radio range, non-directional beacon (H Marker), fan marker or the outer marker of an Instrument Landing System.

B.4. Objects within a civil airway or air traffic control area, more than 170 feet above the ground or more than an elevation that would require the increase in an established minimum flight altitude, whichever gives the higher elevation of the object. The minimum flight altitudes are normally established from the highest point within five statute miles of the center line of the civil airway or air traffic control area for the section of airway or control area affected.

D. W. RENTZEL
Administrator of Civil Aeronautics

APPENDIX E

Statement Describing Technical Standard Order N18

The following statement was prepared by the personnel of the Airports Service Office of the Federal Aviation Agency at the request of Petitioners to aid in the determination of this case by describing in nontechnical terms the history, meaning, and application of Technical Standard Order N18.

STATEMENT

Introduction

Federal Aviation Agency and its predecessor organizations have determined that for safe operation of aircraft the airspace in the vicinity of the airport should be free of objects above certain heights. Technical Standard Order (TSO) N18 prescribes specific standards for determining the airspace above the ground that should be free of structures and objects of natural growth to permit the free and unobstructed flight of aircraft in landing and taking off at an airport. These recommended standards have been applied throughout the country in the establishment of airport zoning regulations. Such standards have been applied in those regulations on the basis that the various height limits recommended have been determined as appropriate by the aeronautical agency of the Federal Government.

History

Criteria for the determination of obstructions to air navigation evolved as the aviation industry grew. The Air Commerce Act of 1926 provided for the "maintenance of lights and other signals on structures over navigable waters for the protection of air navigation". The Act also makes provision for the marking of objects near airports which constitute an obstruction to air navigation. Beginning about 1930, the Aeronautics Branch of the Department of Commerce published a series of bulletins entitled "Regula-

tions Governing Establishment and Certification of Aeronautical Lights and Recommended Standards for Marking Obstructions to Air Navigation". By 1941 these bulletins had been replaced by the "Aeronautical Lights and Obstruction Manual" developed by the Civil Aeronautics Administration. The Civil Aeronautics Act of 1938 required notice of construction for all structures along or near Civil Airways.

In the early 1930's there were many legal writings in favor of State enabling legislation providing for protection of airport approach and maneuver areas. The National Conference of Commissioners on Uniform Laws and the American Bar Association adopted the "Uniform Airport Act" in July 1935. This was model legislation which would enable political subdivisions of the State to acquire air rights over private property to insure safe approaches to landing areas of landing fields. Many states adopted such legislation beginning in 1939. By 1941 the Civil Aeronautics Administration and the National Institute of Municipal Law Officers, together, had developed and published a "Model Airport Zoning Act" which defined "aeronautical hazards".

During the same period, work had been started on the clarification of technical criteria to determine obstructions to air navigation. A mimeographed publication by the Bureau of Air Commerce entitled "Airport Approaches" presented, in addition to written definitions, approach and turning zones graphically illustrated. In 1939 the Civil Aeronautics Administration prepared Standard Drawing Number 152 depicting approach and turning zones for distribution to its field personnel for use in providing advisory assistance to airport owners and managers. This was revised in subsequent Drawings 152A, 152B, and 152C during the period ending January 1941. Changes in the characteristics of aircraft and their operational performance produced evolutionary developments in the standards for protective surfaces resulting in the promulgation of

Drawing 672 in September 1946. Further developments culminated in the preparation of Standard Drawing Number 814 which was incorporated in TSO-N18.

Due to the broad scope of the proposed obstruction criteria, coordination with the following aviation industry and other interested groups was solicited: The Air Transport Association, Aircraft Industries Association, Air Line Pilots Association, American Municipal Association, National Institute of Municipal Law Officers, United States Conference of Mayors, Aircraft Owners and Pilots Association, Independent Air Freight Association, Airport Operators Council, American Association of Airport Executives, National Association of State Aviation Officials, Civil Aeronautics Board, Federal Communications Commission, U. S. Navy, and Air Force. In April of 1950, after agreement had been reached by all segments of aviation, TSO-N18 was published.

In addition, in December of 1950, the Federal Communications Commission adopted as Part 17 of their regulations, with respect to the construction of broadcasting antennas and towers, the definitions and criteria in TSO-N18. The citation of the final rule, as published in the Federal Register in January 1951, is 16-FR-88.

Description of Criteria

The criteria set forth in TSO-N18, by means of imaginary surfaces constructed in the airspace in the environment of the airport, establish for any point on the ground surface the exact height less than which any object or natural growth would not be an obstruction. This height is simply the difference between the elevation at ground level and the elevation at the point vertically above it on the imaginary surface. Two areas have significance in this regard—an approach area associated with the landing area generally oriented along the axis of the runway and a circular area encompassing the airport and its immediate surroundings. The circular areas serve the purpose of providing cleared

areas adjacent to the landing field for circling maneuvers at the airport.

Four different types of airport imaginary surfaces are used. These are the approach surfaces, transitional surface, horizontal surface, and conical surface.

> Consider first the approach surfaces and associated transitional surfaces which make up a trough on the axis of the runway. The trough is widest at its outer extremity narrowing in the direction of the approach to the runway at approximately one foot laterally for each 10 feet along the axis. The entire trough is gently sloping downward to intersect a level imaginary surface at the runway end. The approach surfaces or the base of the trough may have different slopes depending upon the type of landing operation, operational rules affecting descent, or the runway length. On each side of the base of the trough is a steeply sloping surface called a transitional surface. The transitional surfaces provide closures from one surface to another. It is significant to note that aircraft are not flown along these imaginary surfaces but are operated above and within the areas protected.
>
> At a specified height above the established airport elevation, the horizontal surface, circular in shape, is the bottom of a pan which identifies the circular areas. The conical surface arising upward and outward from the horizontal surface makes up the sides of the pan.

All together, these four types of surfaces make up the imaginary surfaces in the airspace surrounding the airport. To put them together, consider that at the furthest point from the center of the airport an airplane circling for an approach in the vicinity of and turning onto the extended axis of the runway enters the approach trough and begins its descent for landing. The approach surfaces and associated transitional surfaces describing the area

of maneuvering are considered adequate for this purpose. At lower elevations, the trough will intersect the conical surface. At a still lower elevation, the approach surface will cut the bottom of the pan or the horizonal surface. The lowest elevation in any of the described imaginary surfaces is the controlling elevation and, thus, establishes the governing imaginary surface. The combination of the trough and the pan is continuous to the level of the controlling elevation at the extremities of the surfaces.

There are approach troughs associated with each end of the runway and for each runway on the airport. Thus, there is a combination of troughs intersecting conical and horizonal surfaces making up a complex shape described by the intersecting surfaces. Below the floor of the pan, the troughs continue toward the ground to the elevation of the runway end. There are also transitional surfaces associated with the lateral extremes of the ground operational area which provide surfaces below the horizonal surface. These surfaces are symmetrically located on each side of the runway parallel to and at the level of the runway centerline. Transitional surfaces extend upward from all approach surfaces to intersect the horizontal and conical surfaces.

APPENDIX F

July, 1960

Model Airport Zoning Ordinance

[Prepared By The Federal Aviation Agency]

FORWARD

Attached is a model airport zoning ordinance, incorporating a typical airport zoning plan, for use as a guide by the political subdivisions of those states which have enacted airport zoning enabling acts. Any airport zoning ordinance must, of course, conform to the prescribed authority of the particular airport zoning enabling act. There is also attached a copy of Technical Standard Order-N18,

which sets forth criteria for determining obstructions to air navigation. It is emphasized that this model ordinance is intended merely as a guide and will require modification and revision to meet the varying local circumstances and law. The model zoning ordinance is limited to zoning of runways; however, by appropriate change in terminology, it may also be applied to zoning for landing strips. The purpose of airport zoning is to prevent the creation or establishment of structures or objects of natural growth which would constitute hazards or obstructions to aircraft operating to and from a particular airport, by regulating and restricting the height of such structures and objects of natural growth in specified areas around the airport.

The model ordinance provides for the establishment of various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft and defines these zones. The areas covered by these zones will vary from airport to airport depending upon, among other things, the size and layout of the airport, the type of aircraft using the airport, the elevation of the landing area above sea level, and the nature of the surrounding terrain. The model ordinance, therefore, leaves the specific zone measurements to be inserted by the political subdivision adopting the ordinance to suit the requirements of its particular airport. The size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18.

The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

The model ordinance also prescribes height limitations for each of the zones established by the ordinance. Any height limitations imposed by an airport zoning ordinance

must be "reasonable" meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation. Therefore, the zoning ordinance should not purport to impose height limitations in any area where the approach slope is close to the ground, which is generally the case in the innermost portions of the approach zone. This problem is taken care of in the model ordinance in Section IV, Height Limitations, which provides that the ordinance shall not be construed as prohibiting the growth, construction, or erection of any tree or structure to a height not to exceed 45 feet.

In cases where the airport is located in an area of undeveloped and relatively barren land the excepted height may possibly be as low as 35 feet. On the other hand if the airport is located in an area that is somewhat built up and where normal use of the land may involve structures 40 to 50 feet in height it would probably be desirable to establish the excepted height limitation at 55 or possibly 60 feet.

In any event, the decision as to the excepted heigh limit to be applied or the distance from the airport at which the height limitations shall commence is one which should be made on the basis of local conditions and circumstances, including the uses being made of property in the vicinity of the airport. In making such decision, the political subdivision should use as much care and follow substantially the same procedure as is generally recognized as desirable in preparing comprehensive zoning ordinances.

Areas in the various zones where the applicable TSO-N18 height limit is below the excepted height limit prescribed in the ordinance should be protected by the acquisition of title or of a property interest sufficient to insure the required protection.

The model ordinance provides for the creation of a Board of Adjustment to hear appeals from decisions of the mu-

nicipal official designated to receive applications and issue permits and for judicial review of decisions of the Board of Adjustment. Such review and appeal procedures are intended to conform to the applicable constitutional requirements.

Attached to the model zoning ordinance and made a part thereof is a typical airport zoning plan. The plan attached to the model ordinance is a hypothetical map for a Trunk type airport according to TSO-N18. This plan is a map of the area affected by the airport zoning ordinance showing, among other things, the layout of the runways, the airport reference point, the airport boundaries, the airport elevation, and the topography of the area. The map also sets forth the various zones with the applicable height limitation for each, as described in the body of the ordinance. The hypothetical plan contains several methods of land identification, as typical in different areas of the country, such as Section, Township and Range, block and lot, metes and bounds, etc. The plan also depicts other identifying geographic objects such as streams, rivers, railroads, roads, streets, etc. By using a map with this amount of detail in conjunction with the text of the ordinance, a property owner may, without undue difficulty, determine not only the location of his property but also the height limitations imposed thereon by the ordinance.

If topographic maps of sufficient accuracy and detail are not available from local governmental sources, a suitable typographic map or maps (Quadrangle maps) might be obtained from the United States Department of the Interior, Geological Survey, Washington 25, D. C. That Agency has developed such maps for quite a large number of areas throughout the country. In addition, in many of the states, appropriate state agencies have available topographic maps developed by either the state or the United States Geological Survey.

MODEL AIRPORT ZONING ORDINANCE

[As corrected by errata sheet dated October 11, 1961]

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF THE ..... AIRPORT BY CREATING AIRPORT APPROACH ZONES, TRANSITION ZONES, HORIZONTAL ZONE AND CONICAL ZONE, AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE ..... AIRPORT ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES.[1]

This ordinance is adopted pursuant to the authority conferred by .....[2] It is hereby found that an airport hazard endangers the lives and property of users of .... Airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of ..... Airport and the public investment therein. Accordingly, it is declared: (1) that the creation or establishment of an airport hazard is a public nuisance and an injury to the region served by ..... Airport; (2) that it is necessary in the interest of the public health, public safety and general welfare[3] that the creation or establishment of airport hazards be prevented,

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[1] This title may need to be revised to meet the usages and legal requirements of your State and the political subdivision in question.

[2] This citation should be made to conform to the usual method of citing your State's laws.

[3] If other terms are commonly used by the courts of your State in defining the limits of the police power, such as "convenience" or "prosperity", they should be added here.

and; (3) that the prevention of these hazards should be accomplished, to the extent legally possible, by the exercise of the police power without compensation. It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which political subdivisions may raise and expend public funds and acquire land or interests in land.

IT IS HEREBY ORDAINED BY .....[4] as follows:

SECTION I: SHORT TITLE

This ordinance shall be known and may be cited as "..... Airport Zoning Ordinance".

SECTION II: DEFINITIONS

As used in this Ordinance, unless the context otherwise requires:

(1) AIRPORT—Means ..... Airport.

(2) AIRPORT ELEVATION—Means the established elevation of the highest point on the usable landing area.

(3) AIRPORT HAZARD—Means any structure, tree or use of land which obstructs the airspace required for or is otherwise hazardous to the flight of aircraft in landing or taking-off at the airport.

(4) AIRPORT REFERENCE POINT—Means the point established as the approximate geographic center of the airport landing area and so designated.

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[4] A form of enacting clause commonly used by the political subdivision in adopting ordinances should be followed.

(5) BOARD OF ADJUSTMENT—Means a board consisting of ..... members appointed by the ..... as provided in .....[5]

(6) HEIGHT—For the purpose of determining the height limits in all zones set forth in this ordinance and shown on the zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(7) INSTRUMENT RUNWAY—Means a runway equipped or to be equipped with electronic or visual air navigation aids adequate to permit the landing of aircraft under restricted visibility conditions.

(8) LANDING AREA—Means the area of the Airport used for the landing, take-off or taxiing of aircraft.

(9) NON-CONFORMING USE—Means any structure, tree, or use of land which is lawfully in existence at the time the regulation is prescribed in the Ordinance or an amendment thereto becomes effective and does not then meet the requirements of said regulation.

(10) NON-INSTRUMENT RUNWAY—Means a runway other than an instrument runway.

(11) PERSON—Means an individual, firm, partnership, corporation, company, association, joint stock association, or body politic, and includes a trustee, receiver, assignee, administrator, executor, guardian, or other representative.

(12) RUNWAY—Means the paved surface of an airport landing strip.

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[5] Insert the number of members appointed to the Board of Adjustment, the appointing body, and the enabling legislation authorizing same.

(13) Structure—Means an object constructed or installed by man, including, but without limitation, buildings, towers, smokestacks, and overhead transmission lines.

(14) Tree—Means any object of natural growth.

Section III—Zones

In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the land lying within the Instrument Approach Zones, Non-instrument Approach Zones, Transition Zones, Horizontal Zone and Conical Zone. Such areas and zones are shown on ..... Airport Zoning Map consisting of ..... sheets, prepared by ....., and dated ..... 19... which is attached to this ordinance and made a part hereof. The various zones are hereby established and defined as follows:

(1) Instrument Approach Zone—An instrument approach zone is established at each end of the instrument runway for instrument landings and take-offs. The instrument approach zones shall have a width of 1,000 feet at a distance of 200 feet beyond each end of the runway, widening thereafter uniformly to a width of 16,000 feet at a distance of 50,200 feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

(2) Non-Instrument Approach Zone—A non-instrument approach zone is established at each end of all non-instrument runways on ..... Airport for non-instrument landings and take-offs. The non-instrument approach zone shall have a width of .....[6] feet at a distance of 200 feet

[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

beyond each end of the runway, widening thereafter uniformly to a width of .....[6] feet at a distance of 10,200 feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

(3) TRANSITION ZONES—Transition zones are hereby established adjacent to each instrument and non-instrument runway and approach zone as indicated on the zoning map. Transition zones symmetrically located on either side of runways, have variable widths as shown on the zoning map. Transition zones extend outward from a line .....[6] feet on either side of the center line of the non-instrument runway, for the length of such runway plus 200 feet on each end; and 500 feet on either side of the center line of the instrument runway, for the length of such runway plus 200 feet on each end, and are parallel and level with such runway center lines. The transition zones along such runways slope upward and outward (1) foot vertically for each (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Further, transition zones are established adjacent to both instrument and non-instrument approach zones for the entire length of the approach zones. These transition zones have variable widths, as shown on the zoning map. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones and slope upward and outward at the rate of (1) foot vertically for each (7) feet horizontally to the points where they intersect the surfaces of the horizontal and conical zones. Additionally, transition zones are established adjacent

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[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

to the instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zones at right angles to the continuation of the center line of the runway.

(4) HORIZONTAL ZONE—A horizontal zone is hereby established as the area within a circle with its center at the Airport Reference Point and having a radius of .....[6] feet. The horizontal zone does not include the instrument and non-instrument approach zones and the transition zones.

(5) CONICAL ZONE—A conical zone is hereby established as the area that commences at the periphery of the horizontal zone and extends outward therefrom a distance of .....[6] feet. The conical zone does not include the instrument approach zones and transition zones.

SECTION IV: HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this Ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:

(1) INSTRUMENT APPROACH ZONE—One (1) foot in height for each fifty (50) feet in horizontal distance beginning at a point 200 feet from and at the elevation of the end of the instrument runway and extending to a distance of 10,200 feet from the end of the runway; thence one (1) foot in height

[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

for each forty (40) feet in horizontal distance to a point 50,200 feet from the end of the runway;

(2) NON-INSTRUMENT APPROACH ZONES—One (1) foot in height for each forty (40) feet in horizontal distance beginning at a point 200 feet from and at the elevation of the end of the non-instrument runway and extending to a point 10,200 feet from the end of the runway;

(3) TRANSITION ZONES—One (1) foot in height for each seven (7) feet in horizontal distance beginning at any point ..... feet normal to and at the elevation of the centerline of non-instrument runways extending 200 feet beyond each end thereof, and 500 feet normal to and at the elevation of the centerline of the instrument runway, extending 200 feet beyond each end thereof, extending to a height of 150 feet above the airport elevation which is ..... feet above mean sea level. In addition to the foregoing, there are established height limits of (1) foot vertical height for each (7) feet horizontal distance measured from the edges of all approach zones for the entire length of the approach zones and extending upward and outward to the points where they intersect the horizontal or conical surfaces. Further, where the instrument approach zone projects through and beyond the conical zone, a height limit of one (1) foot for each (7) feet of horizonal distance shall be maintained beginning at the edge of the instrument approach zone and extending a distance of 5,000 feet from the edge of the instrument approach zone measured normal to the centerline of the runway extended;

(4) HORIZONTAL ZONE—One hundred fifty (150) feet above the airport elevation or a height of ..... feet above mean sea level; and

(5) Conical Zone—One (1) foot in height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone, extending to a height of *..... feet above the airport elevation.

Where an area is covered by more than one (1) height limitation, the more restrictive limitations shall prevail.

Nothing in this Ordinance shall be construed as prohibiting the growth, construction or maintenance of any tree or structure to a height up to 45 feet above the surface of the land.

Section V: Use Restrictions

Notwithstanding any other provisions of this Ordinance, no use may be made of land within any zone established by this Ordinance in such a manner as to create electrical interference with radio communication between the Airport and aircraft, make it difficult for flyers to distinguish between airport lights and others, result in glare in the eyes of flyers using the Airport, impair visibility in the vicinity of the Airport or otherwise endanger the landing, taking-off, or maneuvering of aircraft.

Section VI: Non-Conforming Uses

(a) Regulations not Retroactive. The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other changes or alteration of any structure or tree not conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration, or intended use of any structure, the con-

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* The number to be inserted here should be the elevation determined by appropriate computation pursuant to Paragraph A.7 of TSO-N1s for the category of airport involved.

struction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(b) Marking and Lighting. Notwithstanding the preceding provision of this Section, the owner of any nonconforming structure or tree is hereby required to permit the installation, operation, and maintenance thereon of such markers and lights as shall be deemed necessary by the .....[7] to indicate to the operators of aircraft in the vicinity of the Airport, the presence of such airport hazards. Such markers and lights shall be installed, operated, and maintained at the expense of .....[8]

SECTION VII: PERMITS

(a) Future Uses—Except as specifically provided in paragraphs 1, 2 and 3 hereunder, no material change shall be made in the use of land and no structure or tree shall be erected, altered, planted or otherwise established in any zone hereby created unless a permit therefor shall have been applied for and granted. Each application for a permit shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit shall be granted.

(1) In the area lying within the limits of the Horizontal zone and the Conical Zone, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground, except when because of terrain, land contour or topographic features such tree or structure would extend above the height limits prescribed for such zone.

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[7] Insert here the title of the appropriate official who may be charged with the duty for determining the necessity for lighting and marking.

[8] Insert here the name of the appropriate political subdivision or body.

(2) In the areas lying within the limits of the instrument and non-instrument approach zones but at a horizontal distance of not less than 4,200 feet from each end of the runways, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground, except when such tree or structure would extend above the height limit prescribed for such instrument or non-instrument approach zone.

(3) In the areas lying within the limits of the transition zones beyond the perimeter of the horizontal zone, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground except when such tree or structure, because of terrain, land-contour or topographic features would extend above the height limit prescribed for such transition zones.

Nothing contained in any of the foregoing exceptions shall be construed as permiting or intending to permit any construction, alteration or growth of any structure or tree in excess of any of the height limits established by this Ordinance except as set forth in Section IV.

(b) Existing Uses. No permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this Ordinance or any amendments thereto or than it is when the application for a permit is made. Except as indicated, all applications for such a permit shall be granted.

(c) Non-conforming Uses Abandoned or Destroyed. Whenever the .....[9] determines that a non-conforming structure or tree has been abandoned or more

[9] Insert here the title of the appropriate official charged with making this determination.

than 80 percent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations.

(d) Variances. Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this Ordinance, may apply to the Board of Adjustment for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this Ordinance.

(e) Hazard Marking and Lighting. Any permit or variance granted may, if such action is deemed advisable to effectuate the purpose of this ordinance and be reasonable in the circumstances, be so conditioned as to require the owner of the structure or tree in question to permit the ..... at its own expense, to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to flyers the presence of an airport hazard.

Section VIII: Enforcement

It shall be the duty of the .....[10] to administer and enforce the regulations prescribed herein. Applications for permits and variances shall be made to the .....[10] upon a form furnished by him. Applications required by this Ordinance to be submitted to the .....[10] shall be promptly considered and granted or denied by him. Applications for action by the Board of Adjustment shall be forthwith transmitted by the .....[10]

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[10] Insert here the title of the appropriate official, such as Building Inspector.

Section IX: Board of Adjustment

(a) There is hereby created a Board of Adjustment to have and exercise the following powers: (1) to hear and decide appeals from any order, requirement, decision, or determination made by the .....[10] in the enforcement of this Ordinance; (2) to hear and decide special exceptions to the terms of this Ordinance upon which such Board of Adjustment under such regulations may be required to pass; (3) to hear and decide specific variances.

(b) The Board of Adjustment shall consist of five members appointed by the .....[5] and each shall serve for a term of three (3) years and until his successor is duly appointed and qualified. Of the members first appointed one shall be appointed for a term of one (1) year, two for a term of two (2) years and two for a term of three (3) years. Members shall be removable by the appointing authority for cause, upon written charges, after a public hearing.

(c) The Board of Adjustment shall adopt rules for its governance and procedure in harmony with the provisions of this Ordinance. Meetings of the Board of Adjustment shall be held at the call of the Chairman and at such other times as the Board of Adjustment may determine. The Chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All hearings of the Board of Adjustment shall be public. The Board of Adjustment shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the .....[10] and shall be a public record.

(d) The Board of Adjustment shall make written findings of fact and conclusions of law giving the facts upon

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[10] Insert here the title of the appropriate official, such as Building Inspector.

which it acted and its legal conclusions from such facts in reversing, affirming, or modifying any order, requirement, decision, or determination which comes before it under the provisions of this Ordinance.

(e) The concurring vote of a majority of the members of the Board of Adjustment shall be sufficient to reverse any order, requirement, decision, or determination of the .....[10] or to decide in favor of the applicant on any matter upon which it is required to pass under this Ordinance, or to effect any variation in this Ordinance.

SECTION X: APPEALS

(a) Any person aggrieved, or any taxpayer affected, by any decision of the .....[10] made in his administration of this Ordinance, if of the opinion that a decision of the .....[10] is an improper application of these regulations, may appeal to the Board of Adjustment.

(b) All appeals hereunder must be taken within a reasonable time as provided by the rules of the Board of Adjustment, by filing with the .....[10] a notice of appeal specifying the grounds thereof. .....[10] shall forthwith transmit to the Board of Adjustment all the papers constituting the record upon which the action appealed from was taken.

(c) An appeal shall stay all proceedings in furtherance of the action appealed from, unless the .....[10] certifies to the Board of Adjustment, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed except by order of the Board of Adjustment on notice to the agency from which the appeal is taken and on due cause shown.

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[10] Insert here the title of the appropriate official, such as Building Inspector.

(d) The Board of Adjustment shall fix a reasonable time for hearing appeals, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(e) The Board of Adjustment may, in conformity with the provisions of this Ordinance, reverse or affirm, in whole or in part, or modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision, or determination, as may be appropriate under the circumstances.

Section XI: Judicial Review

Any person aggrieved, or any taxpayer affected, by any decision of the Board of Adjustment, may appeal to the Court of ..... as provided in Section ... of Chapter... of the Public Laws of .....[11]

Section XII: Penalties

Each violation of this Ordinance or of any regulation, order, or ruling promulgated hereunder shall constitute a misdemeanor and be punishable by a fine of not more than ..... or imprisonment for not more than ..... days or both such fine and imprisonment, and each day a violation continues to exist shall constitute a separate offense.

Section XIII: Conflicting Regulations

Where there exists a conflict between any of the regulations or limitations prescribed in this Ordinance and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees,

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[11] Consideration should be given the desirability of setting forth this procedure here, or as an alternative attaching to all copies of this ordinance, a copy of excerpts from the statute cited.

the use of land, or any other matter, the more stringent limitation or requirement shall govern and prevail.

Section XV: Severability

If any of the provisions of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section XVI: Effective Date

Whereas, the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public health, public safety, and general welfare, and Emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the ..... Airport Zoning Board and publication and posting as required by law. Adopted by the ..... Board this .... day of ...., 19.....

APPENDIX G

February 1947

SUGGESTED MODEL

AIRPORT ZONING ORDINANCE

DESIGNED TO EFFECTUATE THE MODEL CAA-NIMLO STATE AIRPORT ZONING ACT OF NOVEMBER 7, 1944

Foreword

The attached is a suggested draft of a model airport zoning ordinance for adoption by political subdivisions of a State which has enacted an airport zoning enabling act conforming to the model airport zoning act of November 7, 1944, prepared and sponsored by the Civil Aeronautics Administration and the National Institute of Municipal Law Officers.

While this suggested ordinance follows the model act in most respects, there are some features of it and some related matters which should be considered.

First, it will be seen that the ordinance draft does not include specific zone limits, or height restrictions, merely providing in Sections 3 and 4 for their insertions by the political subdivisions adopting it. This omission is accounted for in part by the fact that the regulations to be prescribed in each such ordinance must be adapted to the particular airport, taking into account, among other things, the nature of the airport, its size and layout, the nature of the aircraft operations to be accommodated, wind directions, velocities, and frequencies, the elevation of the landing area above sea level, the nature of the surrounding terrain, and the height, location, and nature of the existing obstructions. However, the Civil Aeronautics Administration is always glad to assist political subdivisions and others interested in formulating airport zoning regulations, by having a representative of its Airport Service advise as to what aerial approaches a particular airport should have.

Such aeronautical considerations, however, are not the only ones that should be taken into account in determining what the regulations should be. It is hardly necessary to point out that any airport zoning regulation must, as is stated in Section 6(1) of the model act, be "reasonable", meaning that the height limits prescribed may not be so low that they would constitute a taking of property without compensation in violation of the Federal and State Constitutions. Since CAA standards call for unobstructed airspace above 30 or 40 to 1 flight path beginning at the end of the runway at ground level, it is apparent that a height limit as low as that necessary cannot be imposed by the airport zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of the property in the neighborhood. Consequently, it should be decided locally, after the necessary airport approach flight paths have been determined, the distance from the airport within which the height of structures may not be so limited without being confiscatory, and from this point to the airport boundary aviation easement or title should be acquired as provided in Section 13 of the model act.

In view of these considerations, it is believed that any political subdivision in promulgating airport zoning regulations should use as much care and follow substantially the same procedure as is generally recognized as desirable in preparing a comprehensive community zoning ordinance. Consequently, it is suggested that airport zoning regulations should be based upon a master airport approach plan prepared on the basis of a thorough study of the problem, with the advice of technical experts and after consulting the property owners affected.

In this connection, it should be noted that the model act prescribes certain steps as to hearing and notice to be taken before zoning regulations are adopted under its authority and requires that such regulations be adopted on the basis

of the recommendations of an airport zoning commission (see Section 5 of the model act). These provisions are, of course, jurisdictional and should therefore be strictly complied with.

In addition, it is suggested that it may be desirable to make provision in an airport zoning ordinance for the issuance of certificates of occupancy. In the event that the adopting political subdivision already issues such certificates under a general zoning ordinance, the certificate form might be altered to include a statement that the structure or use in question conforms to the airport zoning regulations as well as to the restrictions in the general zoning ordinance. However, if such certificates are not issued and it is felt that this would be a desirable practice, it is suggested that reference be made to the model provisions on this subject which are set forth at page 18 of Building and Housing Publications HB 16 of the Department of Commerce, "The Preparation of Zoning Ordinances", a copy of which may be obtained from the Superintendent of Documents, Government Printing Office, at a price of ten cents.

Lastly, it is suggested that consideration be given the desirability and feasibility of including a provision in such an ordinance to the effect that the findings of fact of the Board of Adjustment, if supported by substantial evidence, shall be conclusive on appeal.

MODEL AIRPORT ZONING ORDINANCE

(February, 1947)

Civil Aeronautics Administration, U. S. Department of Commerce

and

National Institute of Municipal Law Officers

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF THE ..... MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH, TURNING AND TRANSITION ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES.[1]

In pursuance of the authority conferred by Chapter .... of the Public Laws of .....[2] and for the purpose of promoting the health, safety and general welfare[3] of the inhabitants of ....., by preventing the creation or establishment of airport hazards, thereby protecting the lives and property of users of the ..... Municipal Airport and of occupants of land in its vicinity and preventing destruction or impairment of the utility of the Airport and the public investment therein;

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[1] This title may need to be revised to meet the usages and legal requirements of your State, and the political subdivision in question.

[2] This citation should be made to conform to the usual method of citing your State's laws.

[3] If other terms are commonly used by the courts of your State in defining the limits of the police power, such as "convenience" or "prosperity", they should be added here.

IT IS HEREBY ORDAINED BY THE ..... OF THE ....., ..., as follows:[4]

Section 1. Short Title. This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the ....."

Section 2. Definitions. As used in this ordinance, unless the context otherwise requires:

(1) "Airport" means the ..... Municipal Airport.

(2) "Airport hazard" means any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at the airport or is otherwise hazardous to such landing or taking-off of aircraft.

(3) "Non-conforming use" means any structure, tree, or use of land which does not conform to a regulation prescribed in this ordinance or an amendment thereto, as of the effective date of such regulations.

(4) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic, and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Structure" means any object constructed or installed by man, including, but without limitation, buildings, towers, smoke-stacks, and overhead transmission lines.

(6) "Landing area" means the area of the Airport used for the landing, take-off, or taxiing of aircraft.

(7) "Tree" means any object of natural growth.

Section 3. Zones. In order to carry out the purposes of this ordinance, all of the land within the boundaries of the ..... and within ..... miles of the land-

[4] The form of enacting clause commonly used by the political subdivision in question should be employed.

ing area of the Airport, is hereby divided into airport approach zones, airport turning zones and airport transition zones, the boundaries of which are shown on the ..... Airport Approach Plan numbered ..... and dated ....., which is attached hereto and hereby made a part hereof.

Section 4. Height Limits. Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any airport approach zone, airport turning zone or airport transition zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

.....
.....
.....
.....

Section 5. Use Restrictions. Notwithstanding any other provisions of this ordinance, no use may be made of land within any airport approach zone, airport turning zone or airport transition zone, in such a manner as to create electrical interference with radio communication between the Airport and aircraft, make it difficult for flyers to distinguish between airport lights and others, result in glare in the eyes of flyers using the Airport, impair visibility in the vicinity of the Airport, or otherwise endanger the landing, taking-off, or maneuvering of aircraft.[5]

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[5] If it is desired that certain particular land uses be forbidden within certain airport approach, turning or transition zones, it is suggested that provisions be inserted in this Section, immediately following the heading, reading substantially as follows: "Except as otherwise provided in this ordinance, it shall be unlawful to put any land located within an airport approach zone, airport turning zone or airport transition zone to any use hereby forbidden in such zone. The land uses forbidden in the various airport approach, turning and transition zones are as follows: .....
.....

Section 6. Non-conforming uses. The regulations prescribed in Sections 4 and 5 of this ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration, or intended use of any structure the construction or alteration of which was begun prior to the effective date of this ordinance, and is diligently prosecuted and completed within two years thereof.

Section 7. Variances. Any person desiring to erect any structure or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this ordinance.

Section 8. Permits.

(1) *Future Uses.* No material change shall be made in the use of land, and no structure or tree shall be erected, altered, planted, or otherwise established, in any airport approach zone, airport turning zone or airport transition zone, unless a permit therefor shall have been applied for and granted. Each such application shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure, or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit applied for shall be granted.

(2) *Existing Uses.* Before any existing use, structure or tree may be replaced, substantially altered or repaired,

rebuilt, allowed to grow higher, or replanted, within any airport approach zone, airport turning zone or airport transition zone, a permit must be secured authorizing such replacement, change or repair. No such permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this ordinance or than it is when the application for a permit is made. Except as indicated, all applications for a permit for replacement, change or repair of existing use, structure, or tree shall be granted.

Section 9. Hazard Marking and Lighting. Any permit or variance granted under Section 7 or 8 may, if such action is deemed advisable to effectuate the purposes of this ordinance and reasonable in the circumstances, be so conditioned as to require the owner of the structure or tree in question to permit the ....., at its own expense, to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to flyers the presence of an airport hazard.

Section 10. Appeals.

(1) Any person aggrieved, or taxpayer affected, by any decision of the ..... made in its administration of this ordinance, or the ..... of ....., if of the opinion that a decision of the ..... is an improper application of this ordinance, may appeal to the Board of Adjustment for which provision is made in Section 12.

(2) All appeals taken under this Section must be taken within a reasonable time, as provided by the rules of the Board, by filing with the ..... and with the Board, a notice of appeal specifying the grounds thereof. The ..... shall forthwith transmit to the Board all

the papers constituting the record upon which the action appealed from was taken.

(3) An appeal shall stay all proceedings in furtherance of the action appealed from, unless the ..... certifies to the Board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board on notice to the ..... and on due cause shown.

(4) The Board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(5) The Board may, in conformity with the provisions of this ordinance, reverse or affirm, wholly or partly, or modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the .....

(6) The Board shall make written findings of fact and conclusions of law giving the facts upon which it acted and its legal conclusions from such facts in reversing, or affirming, or modifying any order, requirement, decision, or determination which comes before it under the provisions of this ordinance.

(7) The concurring vote of a majority of the members of the Board shall be sufficient to reverse any order, requirement decision, or determination of the ....., or to decide in favor of the applicant on any matter upon which it is required to pass under this ordinance, or to affect any variation in this ordinance.

Section 11. Administrative Agency. The .....[6] is hereby designated the administrative agency charged with the duty of administering and enforcing the regulations herein prescribed. The duties of the ..... shall include that of hearing and deciding all permits under Section 8, but the ..... shall not have or exercise any of the powers or duties herein delegated to the Board of Adjustment.

Section 12. Board of Adjustment.

(1) There is hereby created a Board of Adjustment[7] to have and exercise the following powers:

(a) To hear and decide appeals from any order, requirement, decision, or determination made by the ..... in the enforcement of this ordinance;

(b) To hear and decide special exceptions to the terms of this ordinance upon which such Board may be required to pass by subsequent ordinances;

(c) To hear and decide specific variances under Section 8.

(2) The Board of Adjustment shall consist of 5 members, each to be appointed for a term of 3 years and to be removable for cause by the .....[8] upon written charges and after public hearing. In the first instance, one member shall be appointed for a term of 3 years, 2 for a term of 2 years, and 2 for a term of one year. Thereafter each member appointed shall serve for

[6] If the political subdivision in question has an Inspector of Buildings, it is suggested that he be designated the administrative agency for this ordinance.

[7] This provision may be omitted if the political subdivision in question has already established such a Board. In that event, however, this section should grant the powers here set out to the existing Board.

[8] Indicate the proper appointing authority.

a term of 3 years or until his successor is duly appointed and qualified.

(3) The Board shall adopt rules for its governance and procedure in harmony with the provisions of this ordinance. Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the atendance of witnesses. All hearings of the Board shall be public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the Board and shall be a public record.

Section 13. Judicial Review. Any person aggrieved, or taxpayer affected, by any decision of the Board of Adjustment, or the ..... of the ....., may appeal to the court of ..... as provided in Section ..... of Chapter ..... of the Public Laws of .....[9]

Section 14. Penalties.[10] Each violation of this ordinance or of any regulation, order or ruling promulgated hereunder shall be punishable by a fine of not more than $..... or imprisonment for not more than ..... days, or both such fine and imprisonment, and each day a violation continues shall be a separate offense.

Section 15. Conflicting Regulations. Where this ordinance imposes a greater or more stringent restriction upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this ordinance shall govern.

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[9] Consideration should be given the desirability of setting forth this procedure here, or, as an alternative, attaching to all copies of this ordinance, a copy of excerpts from the statute cited.

[10] It is possible that this Section may have to be modified to conform to the Constitution of your State.

Section 16. Severability. If any of the provisions of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Section 17. Effective Date. This ordinance shall take effect .....

APPENDIX I

Excerpts from Grant Agreement Between the City of Gary, Indiana, and the Civil Aeronautics Administration of June 1949

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON 25

GRANT AGREEMENT

Part I—Offer

Date of Offer June 22, 1949
Gary Municipal Airport
Project No. 9-12-007-701

To: The City of Gary, Indiana
(herein referred to as the "Sponsor")

FROM: The United States of America (acting through the Administrator of Civil Aeronautics, herein referred to as the "Administrator")

WHEREAS, the Sponsor has submitted to the Administrator a Project Application dated March 11, 1949 for a grant of Federal funds for a project for development of the Gary Municipal Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the Administrator, is hereby incorporated herein and made a part hereof; and

WHEREAS, the Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Land acquisition; clear and grub; grade; drain; turf; pave N/S (approx. 100′ x 3100′) and NW/SE (approx. 100′ x 3600′) runways, apron (approx. 150′ x 175′) and connecting taxiway; construct entrance road; furnish and install segmented circle marker and wind indicating device; approach clearance.

all as more particularly described in the survey map and plans and specifications incorporated in the said Project Application;

Now Therefore, pursuant to and for the purposes of carrying out the provisions of the Federal Airport Act (60 Stat. 170; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

The Administrator, for and on Behalf of the United States, Hereby Offers and Agrees to pay, as the United States' share of costs incurred in accomplishing the project, 25 percentum of the allowable land acquisition costs and 50 percentum of all other allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $166,000.00.

2. The Sponsor shall

   (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and

   (b) carry out and complete the Project in accordance with the terms of this Offer, and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and

   (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representatives.

3. The Sponsor shall operate and maintain the Airport as provided in the Project Application incorporated herein.

4. Any misrepresentation or omission of a material fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligations assumed by the Sponsor in accepting this Offer shall terminate the obligation of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.

5. The Administrator reserves the right to amend or withwdraw this Offer at any time prior to its acceptance by the Sponsor.

6. This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

7. The Administrator, in tendering this offer in behalf of the United States, recognizes the existence of an agency relationship between the City of Gary, Indiana, and the Director of the Aeronautics Commission of Indiana, created by an Agency Agreement, executed by the President of the Board of Aviation Commissioners of Gary, Indiana on February 14, 1949, and by the Chairman of the Aeronautics Commission of Indiana on March 7, 1949, a copy of which is attached hereto and made a part hereof; and the Sponsor agrees that it will not amend, modify, or terminate said Agency Agreement without the prior approval, in writing, of the Administrator or his duly designated representative.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
THE ADMINISTRATOR OF CIVIL AERONAUTICS

By GEORGE W. WEST
Regional Administrator, Region III

Part II—Acceptance

The City of Gary, Indiana, does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 28th day of June, 1949.

CITY OF GARY, INDIANA
(*Name of Sponsor*)

By O. W. BADER
President, Board of Aviation Commissioners, City of Gary.

(SEAL)

ATTEST: C. H. SHAFER
Secretary

* * *

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON, D. C.

PROJECT APPLICATION

For Federal Aid for Development of Public Airports

PART I

PROJECT INFORMATION

The City of Gary (herein called the "Sponsor") hereby makes application to the Administrator of Civil Aeronautics (herein called the "Administrator") for a grant of Federal funds pursuant to the Federal Airport Act of 1946 and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the Gary Municipal Airport (herein called the "Airport") located at latitude 41° 37′ N, longitude 87° 22′ W, in the City of Gary of the State of Indiana.

It is proposed that the Project consist of the following described airport development:

Gary Municipal Airport, first stage construction consisting of grading, drainage, clearing, paving, in re SE-NW runway and N-S runway approximately 100′ x 3600′ together with parking apron and connecting taxi strip, seeding and sodding adjacent areas, providing access roadway and auto parking space as well as miscellaneous necessary construction.

Also acquisition of a ten acre tract of land within the airport site at a cost as shown under Item 1.

* * *

PART II

REPRESENTATIONS

In order to induce the United States to enter into a Grant Agreement with respect to the Project, the Sponsor hereby represents and certifies as follews:

1. LEGAL AUTHORITY—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. FUNDS—The Sponsor now has on deposit, or is in a position to secure, $168,930.50 for use in defraying the costs of the Project. The present status of these funds is as follows: On deposit at Gary Trust & Savings Bank.

The above amount does not include the estimated U. S. Government share of the land costs, to-wit: $1,350.00.

3. LAND—The Sponsor holds the following property interests in the following tracts of land . . . which are to be developed or used as part of or in connection with the Airport, all of which lands are identified on the survey map which is attached hereto as Exhibit "A": Fee simple.

4. APPROVALS OF OTHER AGENCIES—The Project has been approved by all non-federal agencies whose approval is required, namely: Aeronautics Commission of Indiana.

• • • •

7. FUTURE DEVELOPMENT — The Sponsor intends ultimately to develop the Airport as proposed in the current Master Plan Layout for the Airport, which plan has been mutually agreed upon by the Sponsor and the Administrator; and intends to proceed with such further development when it is necessary and feasible. The Sponsor fur-

ther represents that pending such further development and to the extent of its ability to do so, it intends to acquire the lands and interests therein necessary for such development or to take such other action as will protect such proposed lands or interests from any development thereof inconsistent with the intended airport use.

PART III

SPONSOR'S ASSURANCES

In order to furnish the Administrator the Sponsor's assurances required by the Act and the Regulations, the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes; *Provided,* That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further,* That the Sponsor may prohibit any given type, kind or class of aeronautical use of the Airport if such action will best serve the aeronautical needs of the area served by the Airport.

3. The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by Section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm or corporation to exercise, any exclusive right for the use of the airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(a) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish good, prompt and efficient service* adequate to meet all the demands for its service* at the Airport.

(2) to furnish said service* on a fair, equal and non-discriminatory basis to all users thereof, and

(3) to charge fair, reasonable and non-discriminatory prices for each unit of sale or service*; *Provided,* That the contractor may be allowed to make reasonable and

* See footnote on page 71a.

non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

* * *

8. Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

9. All facilities of the Airport developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable

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* Note: As used in these subsections the word "service" shall include furnishing of parts, materials and supplies (including sale thereof) as well as furnishing of service.

share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefore shall be determined by the Sponsor and the using agency.

10. The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

* * *

13. The Sponsor will maintain a master plan of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan in making any future improvements or changes at the Airport which, if made contrary to the master plan, might adversely affect the safety, utility, or efficiency of the Airport.

* * *

PART IV

PROJECT AGREEMENT

If the Project or any portion thereof is approved by the Administrator and an offer of Federal aid for such approved project is accepted by the Sponsor, it is understood and agreed that all airport development included in such project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for

such development, as approved by the Administrator, and the Grant Agreement with respect to the project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 11th day of March, 1949.

CITY OF GARY

By O. W. BADER
President, Board of Aviation Commissioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners*

VS.

INDIANA TOLL ROAD COMMISSION

On writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE AERONAUTICS COMMISSION OF INDIANA AND OTHERS AS AMICI CURIAE

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AMICI CURIAE

INDIANAPOLIS PRINTING COMPANY, INDIANAPOLIS, INDIANA

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VS.

INDIANA TOLL ROAD COMMISSION

On writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE AERONAUTICS COMMISSION OF INDIANA AND OTHERS AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a municipal ordinance which prohibits placing structures in excess of certain heights upon property, for the purpose of protecting aerial highways in airport approach zones from encroachment, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the constitutionality of such legislation can be decided by regarding its effect only in isolated instances.

3. Whether the ordinance of the City of Gary can be declared unconstitutional on the record in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949 (Pl. Ex. 3; R. 151, 56).

Section 1 of the Fourteenth Amendment to the Constitution of the United States (due process clause).

The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, as amended by the Acts of 1945, Chapter 109, Section 1. The pertinent portion of this statute is that section which empowers municipal boards of aviation commissioners to adopt airport zoning ordinances. Section 9, which is the pertinent section, appears in Appendix A, pp. 1a, 2a, *infra*.

The Acts of the General Assembly of Indiana of 1957, Chapter 23. This statute appears in full in Appendix B, pp. 1b thru 7b, *infra*.

INTERESTS OF AMICI CURIAE

The Aeronautics Commission of Indiana, the Indianapolis Airport Authority, the City of Indianapolis, the Evansville-Vanderburgh Airport Authority District, and the Board of Aviation Commissioners of St. Joseph County (South Bend), appear herein as *amici curiae* for the purpose of seeking to aid the Court to frame the issues and to arrive at a decision which will serve as precedent in a new area of law troubled by serious questions. We feel that this case is the logical outgrowth of the line of cases which began with *United States v. Causby*, 328 U.S. 256 (1946). The *Causby* case enunciated the doctrine that

property rights are invaded by repeated low flights of aircraft, yet at the same time stated that certain reaches of the navigable air space are within the public domain. The case of *Griggs v. Allegheny County*, 369 U.S. 84 (1962), extended the principle in the *Causby* case, and gave a further meaning to the rights of subjacent owners affected by low level flights. It must be expected that with increasing traffic, ever advancing technology and the advent of supersonic transportation, the rights of subjacent owners are going to be in need of further judicial clarification. While these rights are being more precisely defined, it will be correspondingly necessary to further delimit the reaches of the usable air space lying within the public domain.

The Aeronautics Commission of Indiana has a direct and substantial interest in preserving, policing and protecting the navigable air space in the State of Indiana.[1] Created by the Acts of the General Assembly of Indiana of 1945, Chapter 360,[2] the Aeronautics Commission of Indiana is charged with the regulation and administration of Indiana airport problems. The Indiana municipalities joining in this brief have similar but more specific interests in this case. Each of them either has enacted, or is planning the enactment, of legislation similar to the Gary Ordinance.[3]

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1. The Acts of the General Assembly of Indiana of 1957, Chapter 23, as found in Burns' Ann. St. (1964 Repl.), Section 14-327 *et seq*, Appendix B *infra*.

2. As found in Burns' Ann. St. (1964 Repl.), Section 14-312 *et seq*.

3. Marion County, Indiana, in which the City of Indianapolis is located, has adopted a county-wide ordinance defining and describing the various aerial approaches and protective zones leading to Weir Cook Airport, which serves Indianapolis and central Indiana and

(Continued on following page)

All of the governmental units participating in this brief, and many others which are not directly participating, are vitally concerned with the question whether legislative attempts to protect the navigable airspace in approaches to airports are valid constitutional exercises of the police power in the interest of the preservation of the airport as a functioning public utility and in the interest of public safety.

We expect that the parties herein might attack or defend the Gary Zoning Ordinance as a matter of absolute validity or invalidity. Since, however, the decision in this case will affect airports and air transportation, and the safety of the flying and non-flying public everywhere, we feel that certain questions must be answered which the parties hereto might not have an interest in presenting.

SUMMARY OF ARGUMENT

We believe that this case cannot be decided without first deciding two questions which have application to aviation

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(Continued from preceding page)

somewhat in excess of one million people. This zoning ordinance, like the ordinance of the City of Gary, in addition to defining the approaches, also protects the approaches from encroachment. At the same time, however, the Marion County Ordinance, in recognition of circumstances peculiar to Weir Cook Airport and in recognition of property rights and property uses in the immediate area, does not seek to prohibit structures which rise fifty feet or less above the runway elevation. It was assumed that the proper method of controlling most structures below that height was by acquisition of property rights and not by an attempted exercise of police power. Ordinance Of the Marion County Council, Airport District Ordinance 63-AO-3, adopted September 4, 1963.

The St. Joseph County ordinance is entitled "St. Joseph County Airport Zoning Ordinance, adopted March 15, 1954."

The Evansville-Vanderburgh Authority presently has under consideration an ordinance but is postponing final adoption.

D

and airports generally. The first question is whether the police power may be exercised to protect the navigable air space from encroachment.

The position taken by your *amici* in this brief is that the police power may be legitimately exercised for such purposes. The navigable air space has been declared to be a part of the public domain,[4] so that the public's interest therein may be preserved and protected, just as public rights in navigable waters may be protected.

The distinction between legislation which exercises the police power and legislation which confiscates property without compensation is an evasive one. It is therefore important to ascertain the proper test for the validity of such legislation. Your *amici* takes the position in this brief that where legislation is reasonably directed toward protection of the navigable air space, and does not impose obvious undue hardships upon property owners, the legislation is valid. Such legislation must apply equally and fairly to all and must bear a reasonable relationship to the protection of the public welfare.

Only after these questions have been answered can this case be decided. We take the position that the trial court did not adequately examine the Gary Ordinance and its application to land in the zoning area, so as to enable that court or any appellate tribunal to reach a conclusion as to the validity of the ordinance as a whole.

Since the question concerning the constitutionality of this ordinance arose upon an attempt to place the ordinance in evidence, the constitutional challenge is to the ordinance as a whole and not just to its application to a specific piece

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4. U.S. v. Causby, *supra*.

of property (R.56). We feel that the principle of law laid down by this Court in the case of *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), precludes the court from deciding the validity of the Gary Ordinance merely upon an examination of its application in one case. We further believe that the court, whose decision is here appealed from, did not indulge a presumption in favor of the constitutionality of the ordinance, and, moreover, ignored the "fairly debatable" rule of the *Euclid case*.[5]

ARGUMENT

The opinion of the Supreme Court of Indiana in this case did not clearly indicate whether its decision was rendered upon the basis of the Constitution of the State of Indiana, Article 1, Section 21, or the Constitution of the United States, Fourteenth Amendment, Section 1. The court did, however, find that an unconstitutional taking had been attempted by the ordinance in question (R. 214, 216). Since both Constitutions contain nearly identical restrictions against the taking of private property for public use, it makes little difference which Constitution the Supreme Court of Indiana considered. For the purpose of the decision of this Court, the Fourteenth Amendment to the Constitution of the United States will control, and the question of unlawful taking may be reviewed in that light.[6]

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5. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388.

6. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

I

LEGISLATION WHICH PROTECTS AERIAL HIGHWAYS AND APPROACHES FROM ENCROACHMENT DOES NOT VIOLATE THE CONSTITUTIONAL PROSCRIPTION AGAINST APPROPRIATION WITHOUT COMPENSATION

Zoning Legislation Is Necessary for Protection of the Public Welfare In and Around Airport Approaches

Because of the extended approach zones necessary to accommodate large jet aircraft, airport approach zones, of necessity, extend many miles outward from today's airports. Due to the increasing pressure of heavy air traffic, the airport approach zones have become quite complicated, allowing for approaches by all types of aircraft from various directions and in various patterns to meet traffic needs. The approach patterns for even airports of medium size, such as the airport of the City of Indianapolis, overlie many square miles of land surface area. In fact, the Indianapolis air approach system extends over much of the City of Indianapolis and the populous parts of the county. Dozens of square miles of territory are involved and tens of thousands of individual property owners are affected, at least technically, by these air approaches. Of these many owners, only the smallest number will experience any actual use limitation due to the air approaches. In the vast

majority of cases, of course, the property owner is not even aware that his property lies beneath an air approach pattern.

The safety of flight and the public traveling by air transportation depends upon the establishment and protection of these air approach systems. Otherwise it would not be possible for aircraft to move into and out of the nation's airports. Affected too, are the persons living and working in the area beneath air approach highway systems. If a mishap occurs in one of these aerial highways, the safety of the public below is seriously involved.

Smoke, lights, electrical interference and physical obstructions all pose serious hazards to air transportation. The public welfare therefore requires the protection of these air approach systems through legislation which has application to the entire area. Only zoning can accomplish this.

Aerial Highways As A Part of the Public Domain

The public has always been held to hold an interest in the uses of land and waters so that travel by the public upon the surface of the earth would be possible.[7] The law has protected and preserved public rights in roads and highways, and upon navigable waters. Only very recently was the public declared to have an interest in the navigable airspace:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe —*Cujus est solum ejus est usque ad coelum.* But that

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7. 65 CJS Navigable Waters § 20;
39 CJS Highways § 19.

> doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. *United States v. Causby*, 328 U.S. 256, 260 (1946).

The public domain in the upper reaches of the airspace was given even greater meaning by the *Causby* case, as the decision went on to define it:

> "The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. §180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, § § 61.-7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, § § 60.350-60.3505, Fed. Reg. Cum. Supp., *Supra.* Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included,

> flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight," *Id.* at 263.

This principle has likewise been recognized by statute in the State of Indiana.[8] This statute provides in part as follows:

> "Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

Defining the Lower Reaches of the Public Domain

It was not necessary to the decision in the *Causby* case that any attempt be made to define the lower extremes to which the public domain could extend.[9] The Court ob-

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8. The Acts of the General Assembly of Indiana of 1927, Chapter 43, Section 4, as found in Burns' Ann. St. (1964 Repl.), Section 14-104.

9. "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that

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served that although the glide path was some 83 feet over the land, the frightening and noisome presence of heavy aircraft in such proximity to the dwelling and buildings of the landowner resulted in an interference with the use and enjoyment of the land.

It cannot be concluded that flight above the altitude of 83 feet is automatically lawful. By the same token it cannot be concluded that all flights below such level constitutes a trespass upon the subjacent property.[10] It has often been

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phase of the present case. For the findings of the Courts of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land." *United States v. Causby, supra* at 266.

10. Upon retrial of the *Causby* case, the court said: "Taking into consideration the situation of this property and its actual and probable future use, we are of the opinion that the flight of airplanes above this altitude of 365 feet imposed no real servitude on it. The result of this, we recognize, is to vest in the United States the right to fly its airplanes at any altitude above 365 feet with impunity. This, of course, would prevent the plaintiffs from erecting on their property a building of the height of the Empire State Building or of any structure more than 365 feet in height. Were this property located at a place where there was any likelihood that such a structure would be erected on it, the defendant, without paying for it, would have no right to the airspace above the property to an altitude so low as would prevent such a structure from being erected. But here there was but the most remote possibility that plaintiffs would ever put this property to such a use. The flight of airplanes above their property at a greater altitude than 365 feet in no way interfered with their possession and enjoyment of it or with any use they might conceivably make of it. In such case we do not think the defendant should have to pay for the right to fly its airplanes above this altitude. Stated otherwise—if defendant flew its airplanes at 366 feet or more above this property, we do not think it can be said that it has imposed a servitude upon it. But in a case where the possibility of the erection of a structure above this minimum height is a real one, and not merely fanciful, we would, of course, be presented with a different problem." *Causby v. United States*, 75 F. Supp. 262, 264.

held that when low flights occur, there is no "taking" if such flights do not substantially interfere with the use and enjoyment of the land.[11]

As already discussed, the opinion in the *Causby* case declared that the airspace above the minimum flight altitudes, as set by the Civil Aeronautics Authority, forms part of the public domain. These minimum flight altitudes might be referred to as cruising altitudes, or altitudes at which aircraft in normal flight travel, when neither landing nor taking off. Just as the senses revolt at the notion that cruising altitudes should not be a part of the public domain, so do they revolt at the notion that aircraft must be said to have left the public domain immediately upon departing from cruising altitudes. If an aircraft at 1,000 feet altitude is within the public domain, it is difficult to see how, upon descending to 999 feet, it must be said to have left the public domain.

The Indiana statute provides that flight ". . . is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over

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11. Moore v. United States, 185 F. Supp. 399 (D.C.Tex, 1960); Freeman v. United States, 167 F. Supp. 541 (D.C. Okla, 1958), (factual question as to whether or not flights over subjacent property amounted to a "taking"); Harring v. United States, 162 F. Supp. 760 (Ct. Cl. 1958) (flights at altitudes of 75 feet over plaintiff's property do not amount to substantial interference); Highland Park Inc. v. United States, 161 F. Supp. 597 (Ct. Cl. 1958), (no serious interference with the use and enjoyment of the plaintiff's property by flights thereover of altitudes of between 200 feet to 1200 feet); Allegheny Airlines, Inc. v. Cedarhurst, 238 F. 2d. 812 (2nd Cir. 1956), (infrequent flights over the plaintiff's land at altitudes of from 450 feet to 1500 feet); Hempstead Warehouse Corp. v. United States, 98 F. Supp. 572 (Ct. Cl. 1951), (no taking where no showing of actual damages); Cheskov v. Port of Seattle, 348 P. 2d. 673 (Wash. 1960).

the land or water, is put by the owner . . . ."[12] Therefore, if flight at 1,000 feet does not interfere with the use of the land, it is quite reasonable to suppose that flight at 999 feet might likewise not cause an interference.

The test of the lawfulness of the flight is therefore one of fact. This Court, in the *Causby* case, stated the test thusly:

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. . . [T]he findings of the Court of Claims "plainly" establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land." *United States v. Causby, supra* at 266.

The same principle might be stated in different terms by saying that in the event that the value of the subjacent land has been significantly diminished, there has been a trespass or taking. The *Causby* opinion also enunciated this idea when the case of *United States v. Cress*, 243 U.S. 316 (1917), was quoted with approval:

> " ' . . . it is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking'." *United States v. Causby, supra*, at 266 (Emphasis added).

The language of the *Causby* case also affords us the

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12. The Acts of the General Assembly of Indiana of 1927, *supra*.

means of determining whether the damage has been substantial.

> "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U.S. 369. Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as the existing use." *Id.* at 261.

Stated in another manner, flight does not constitute a trespass or a taking of property and is within the public domain so long as the market value of the subjacent property is not measurably diminished. *Cheskov v. Port of Seattle*, 348 P 2d. 673 (Wash. 1960). The market value must, of course, be measured according to the highest and best use of the property. Damages *de minimus* would not indicate a taking, just as intermittent flight could not be expected to unreasonably affect market value. *Aaron v. U.S.* 311 F. 2d 798 (Ct. Cl. 1963); *Bacon v. United States* 295 F. 2d 936 (Ct. Cl. 1961).

The lower reaches of the public domain should therefore be defined by resort to the facts and circumstances peculiar to each case and to each property. For instance:

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." *United States v. Causby, supra* at 262.

In such situations there would be a trespass or taking. But if the glide path over a wheat field or grazing land left it still usable for such purposes, although it might have made such property useless as factory sites or residential

sections had it been adapted to such purposes, the flight would not diminish the value of the land and would constitute neither a trespass nor a taking.

The air approach system of the airport of any sizable community will overlie and affect, at least in theory, thousands of parcels of property. In cities such as New York and Washington it requires no imagination to realize that it might be claimed that tens and almost hundreds of thousands of properties have been affected. Each situation must be judged on its own facts, for no absolute can be drawn, beyond which it can be said that property has or has not been taken.[13]

Protection and Preservation of the Public Domain

The public's right to free and uninterrupted travel upon the public roads and highways is normally protected by statute and common law from purprestures or nuisances which encroach upon the public way. Likewise the public's right to travel upon navigable waters is normally protected by statute and common law. It is perhaps more important that the public right in the navigable airspace be protected from encroachment than that these other public ways be. A multi-million dollar airport could be rendered useless by one property owner who, through pure malice, erects a hazardous structure penetrating into the glide path of approaching air traffic. Life and property could thereby be placed in greater peril than would occur by obstructing a public way on the earth's surface.

It necessarily follows that the sovereign, which may protect other public ways, may also exercise the police power to protect aerial highways. Encroachments might occur deliberately without reasonable justification, or they might occur naturally, through technological changes and changes

13. U.S. v. Central Eureka Mining Co. 357 U.S. 155, 168 (1958).

in land uses. In either case the safety of the flying and non-flying public is vitally involved, and transportation of the public by air might be rendered impossible or impractical.

We reject the reasoning of the Supreme Court of Indiana by which it was able to conclude that the police power does not extend to airport zoning. The fallacious reasoning of the court is perhaps best epitomized by the following language, where another case was quoted with approval:

> " 'The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport . . .' " (R. 212).

This statement is its own best refutation. We might paraphrase this statement as follows: "What is not a nuisance today can never become a nuisance, irrespective of changing land uses and of the requirements of public safety." The decision of the Supreme Court of Indiana was thus built upon a false foundation of erroneous premises.

It is not enough to say that airports can be protected by acquisition of avigation easements. As discussed above, air rights in thousands upon thousands of properties would have to be acquired, in part, in order that the air highways might be protected for a single airport. Only a very few properties would really suffer a diminution in value or undergo any but *de minimus* damages. While the *possibility* of change in land use might make it necessary to place restriction upon property in order to protect the air highways from future uses, the measure of damage is according to the degree by which the value of the land has

diminished for the *presently* existing highest and best use. To demand acquisition of air rights in order to protect all of the navigable airspace in airport approaches is to demand the virtually impossible, to say nothing of the futile litigation which must result.

This then is the function of air approach protective legislation. Such legislation should prevent undue glare, electrical interference, smoke and other hazards which would endanger life and property.[14] Such legislation should also protect the navigable airspace from encroachment, and, at least to the extent that such legislation does not place a burden on the affected property which causes a diminution in value, such legislation is a valid exercise of the police power and does not constitute a taking for a public purpose.

Tall structures pose the most easily recognizable hazard to air transportation. In Indiana tall structures are regulated by statute throughout the state.[15]

It is important to note that this statute protects the navigable airspace both at cruising altitudes and in approach zones. The cruising altitudes are protected by restriction against structures over 500 feet above the highest ground in a certain area,[16] while the approach zones are protected both by maximum approach zone heights and a mathmatical ratio corresponding to the glide path.[17] It is significant to note that permits may be obtained which grant an exemption from the act, and full review is accorded any

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14. Note the provisions of the ordinances discussed in the *Yara*, *Waring* and *Sneed* decisions, *infra*.

15. The Acts of the General Assembly of Indiana of 1957, Chapter 23, Appendix B, pp. 1b thru 7b, *infra*.

16. Section 3, (b), Appendix B *infra*.

17. Section 3, (a).

person seeking such a permit.[18] It is apparent upon its face that this legislation is an intended exercise of the police power.[19]

Since the provisions of the state statute could not be expected to be adequate for individual airports, the act does not have application to areas where local airport zoning regulations have been adopted,[20] and the legislature had already provided for adoption of air approach protective zoning by local boards of aviation commissioners.[21]

It was pursuant to this state legislation that the Gary Zoning Ordinance, which is the subject of this appeal, was adopted. If the Gary Ordinance *per se* violates the Constitution, then there is a very serious question whether the other legislation might also. At any event, the first question which must be answered is whether through exercise of the police power, the navigable airspace can be protected from encroachment.

Protection of the Navigable Airspace as Distinguished From Appropriation

Height restriction through zoning has been recognized since about the turn of the century and if the height zoning is reasonably related to prevention of undesirable conditions, it has been held to be a proper exercise of the police power.[22]

18. Section 5, *et seq.*

19. Section 7 provides in part that: "In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors."

20. Section 13.

21. The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, Appendix A pp. 1a-2a, *infra.*

22. Welch v. Swasey, 214 U.S. 91 (1909).

While some cases have upheld the validity of legislation which protects the aerial highways, other cases have held it invalid on the ground that the legislation attempts to appropriate property without payment of compensation. That is the basis of the decision of the Supreme Court of Indiana in this case, and it is to this proposition which we take strong exception.

Enough has already been said in this brief to show that protective legislation of this sort is valid as within the police powers of the sovereign. Several cases have already established the validity of this type of legislation, and should be discussed here.

The most recent and unquestionably best reasoned case involving airport zoning is *Baggett v. City of Montgomery*, 160 So. 2d. 6(Ala. 1964). This involved a suit for declaratory judgment to declare an airport zoning ordinance invalid. In ruling in favor of the ordinance, the court observed:

> "In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided that the restrictions were in whole or in part reasonably related to all or a part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act." *Id* at 8.

The court considered at length the legislative intent behind this legislation and found that it was proper. The provision for variances and administrative and judicial review provide sufficient protection against unlawful appropriation or confiscation.

The court assumed *arguendo* that some property would be adversely affected, but stated that:

> "We hold that the statutory genises of the ordinance amply protects any property owner against confiscation of his property or any arbitrary and unreasonable control of such property rights. If the general restrictions as to structures or the uniform and blanket limitation as to height of any building or tree works an injustice or imposes any unfair restraint on a property owner as to the use of his property, he has a clear and adequate remedy for relief. We do not think this court should strike down the entire ordinance because of an abuse of some individual rights." *Id.* at 9.

In the case of *Waring v. Peterson*, 137 So. 2d. 268 (Fla. 1962), a direct attack was made upon a zoning ordinance which limited the height of structures within the approaches to an airport. The ordinance also placed restrictions upon land use so as to prevent smoke and radio interference within areas where such would interfere with operation of the airport. Also certain types of buildings were prohibited, specifically those which would place numbers of persons below the approaches and thereby subject them to unnecessary risk. Expert testimony showed that the value of land affected by the ordinance was not greatly diminished. The land affected was agricultural and the ordinance did not restrict the value of the property for any purposes reasonably forseeable.

The court concluded that:

> " . . . the ordinance constitutes a reasonable and proper exercise of the police power. Moreover, even if the question is 'fairly debatable', the court should not substitute its judgment for that of the enacting governmental agency. Under the evidence, this issue on appeal is at least fairly debatable." *Id.* at 270.

In *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 So. 2d. 439 (Fla. 1959), the court affirmed the action of the lower court, which enjoined the maintenance of an obstruction which was 13.36 feet higher than the authorized height of 27.64 feet, as established by the airport zoning ordinance in question.

In dealing with the question of the constitutionality of the municipal ordinance, which was authorized by the Florida Legislature, the court stated:

> "There is no longer any question concerning the power of the Legislature to authorize agencies of the government to adopt and enforce zoning regulations. We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and landing as well as those living in the vicinity thereof. In many cases this Court has upheld the exercise of the police power by counties and municipalities in the enactment of zoning regulations restricting height, number of stories, size of buildings and other structures, percentage of lots that may be occupied, the size of courts and other spaces, the density of population and the location of buildings and structures and land and water for trade, industry and other purposes.

> There has been much litigation in the field of zoning, particularly in Florida, and the jurisprudence in that field has been extensively developed. These well settled principles now so firmly established with reference to municipal and county zoning apply equally to airport zoning." *Id.* at 443.

The court went on to point out that the question in the case was whether the regulation restricting the height of appellant's building was reasonable. The trial court found that the regulation did not deprive the owner of the substantial, beneficial use of his property, even though the height was restricted. The court further said:

> "Courts will not substitute their judgment as to the reasonableness of a particular rule or regulation where such has been duly adopted pursuant to lawful authority when such reasonableness is fairly debatable. This latter principle has become so well established in the law of zoning that it has been appropriately labelled with the designation the 'fairly debatable' rule." *Ibid.*

Several cases might mistakenly be thought to hold that such legislation is invalid. Although the case of *Banks v. Fayette County Board of Airport Zoning Appeals*, 313 S. W. 2d 416 (Ky. 1958), has been cited on occasions as authority for the invalidity of airport zoning, this case does not really so hold. The *Banks* case involved a review of action of the zoning board in denying a building permit. The board had based its action on a provision of the airport zoning ordinance which prohibited certain types of buildings within certain distances of the airport. The regulation prohibited commercial buildings but permitted apartments and hospitals. The court did not accept the argument that the regulation sought to prevent congestion of people to avoid danger to them. It observed that to permit hospitals or apartment buildings, but not to allow commercial establishments, did not show reasonableness in the regulation.

The court held that the regulation was void and ordered that the permit should be issued. The court did not decide that the attempt to regulate, itself, was invalid. It seems rather that this type of zoning was taken for granted as being valid. Note too, that a permit was ordered issued, which seems to indicate that a permit still was needed in spite of this holding.

Other cases have specifically held airport zoning to have an unlawful effect upon property. These cases, however, have been limited to the facts of the particular property involved, or else have been decided on the basis of the statute involved.

The decision in *Dutton v. Mendocino County*, 1949 U.S. Av. 1, (Cal. Super. Ct. 1949), is the written holding of a *nisi prius* court. It involved a county ordinance which limited the height of structures on the plaintiff's lands to 20 feet within 500 feet of the exterior boundaries of the airport and to as much as 30 feet elsewhere on his land. The court held the ordinance to be unconstitutional but in so doing made several important findings. The court found that the value of the land was drastically diminished by the ordinance and also found that the ordinance was not necessary for the approach for aircraft. Under the circumstances the court concludes that the ordinance was an attempted substitute for what should have been eminent domain, so, necessarily, the ordinance was unconstitutional.

Mutual Chemical Co. v. Baltimore, 1939 U.S. Av. 11, (Md. CC. 1939) is another written holding of a *nisi prius* court. Again it appears that very substantial rights in property had been destroyed and that the ordinance was only a disguised substitute for purchase. The court observed that:

> "It appears that the zoning of an area surrounding an airport is rather for the benefit of those who desire

aerial transportation and for those who use airplanes than for the general public." *Id.* at 16.

Under these circumstances it is certainly apparent that the police power was not really involved in either case. Moreover both cases have involved what appear to be severe restrictions upon the use of property. These cases do not flatly deny the validity of airport zoning but instead turn to the facts and the unreasonable effect of the ordinance in order to conclude that they are invalid. From a reading of these cases it is quite easy to conclude that the ordinances were patently unreasonable, and this apparently is the conclusion that the courts reached.

In *Yara Engineering Corp. v. City of Newark*, 40 A. 2d. 559, (N.J. 1945), an "Airport Zoning Ordinance of the City of Newark" was involved, which regulated and restricted the height of structures and objects of natural growth on property in the vicinity of Newark Municipal Airport. The court concluded that since New Jersey had no statute which specifically authorized the enactment of an ordinance for the zoning of land solely for the use of an airport, the ordinance was invalid.

The court, although specifically basing its decision on the lack of statutory authority for the questioned ordinance, nevertheless goes on to emphasize the fact that such an ordinance would be void anyway.

> "To restrict the height or building of any structures or trees, or to interfere electrically with communication or impair visibility by lights, etc., or in any way to use property within two miles of the airport to endanger the landing or taking off, etc., of aircraft, as provided in the questioned ordinance, is an interference with the rights of property ownership, which is not within the contemplation or purpose of the zoning law. The City may not under the guise of an ordinance

acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain." *Id.* at 561.

This court not only indicates that it believes that height restriction is not a valid exercise of the police power, but even that the control of electrical interference and blinding lights is beyond the police power. An erroneous conclusion that height restriction is not valid can be forgiven, particularly as it is dictum. On the facts of this case the City of Newark had first agreed to buy the land in question and later had rescinded its action, choosing to rest its protection upon the ordinance. According to the evidence, the value of the land, if restricted by the ordinance, would have been only nominal.

In the case of *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (1963), the court upheld an action in inverse condemnation for property rights claimed to have been appropriated by an ordinance. The court used the *Causby* and *Griggs* decisions as authority for its holding. Certainly the *Causby* and *Griggs* decisions *do* hold that where the reasonable enjoyment and use of land has been diminished by actual flight, the property has been taken and the owner can recover his loss. Abundant authority exists upon this proposition. *Neither of these cases however holds that property rights can be appropriated by legislation, nor do they hold that the sovereign, in the exercise of the police power, may not interdict encroachments into the navigable airspace.*

The *Sneed* decision in fact rested on the case of *Ackerman v. Port of Seattle*, 348 P. 2d. 664 (Wash. 1960), but that case merely held that legislation cannot proclaim that all of the airspace is in the public domain. This had already been stated in the *Causby* decision. The *Ackerman*

decision in fact contains the following statement which follows the reasoning in the *Causby* decision:

> "Any prescribed safe minimum altitude of flight must be reasonable. The present standards for flight (500 feet over noncongested areas, and 1,000 feet above the nearest obstacle over congested areas) have been accepted as reasonable. Any attempted prescription of a lower altitude is subject to examination for its reasonableness and to a determination as to whether it amounts to a constitutional taking of one's property." *Id.* at 671.

The Ackerman decision also draws a distinction between the exercise of the police power and eminent domain.

> "When private property rights are actually destroyed through the governmental action, then police power rules are usually applicable. See State *ex. rel.*, Miller v. Cain, 1952, 40 Wash. 2d, 216, 242 P. 2d, 505. But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable." *Id.* at 669.

Certainly this is a correct statement of the law, and the holding of the *Ackerman* decision is unquestionably correct. This case is definitely not authority for the *Yara* or *Sneed* decisions however.

Regulation, if reasonable, will not result in significant diminution of property value, although, because of the subjective and complex nature of land use, some individual properties might be affected more than others. Certainly if the regulation were a thinly disguised substitute for land purchase it could never be said to be reasonable. The *Yara* and *Sneed* decisions proceeded from a finding that the regulation was burdensome, and designed to appropriate property to public use, to a conclusion that the regulation was

invalid. To the extent that these observations applied to that regulation as a whole, or to the one specific instance before the court, the decisions might be correct. But to the extent that these decisions might be deemed to hold that all air space protective legislation is invalid, or that the validity of an entire regulation can be decided by reference to an isolated situation, the cases are seriously in error.

How an Avigation Easement Differs from a Restriction on the Height of Structures

As a consequence of the *Causby* and *Griggs* decisions of this Court, it is apparent that the servitude imposed by an avigation easement is comprised, in part, of the servitudes to noise, vibration and proximity of traffic.

Also a part of the servitude is the volume and type of traffic involved, as well as the glare of landing lights. *Bacon v. U. S.*, 295 F. 2d. 936 (Ct. Cl. 1961). Perhaps the most obvious servitude is the restriction placed upon certain uses, including erection of structures into the glide path. Irrespective of the restriction on height, the use of the land also is restricted. Thus the land might become unsatisfactory for schools, chicken or mink farming, or other uses where the presence of aircraft would make such uses impractical.

Restriction on the height of structures is only one component of the complex of servitudes that go together to comprise an avigation easement. Certainly it cannot be maintained that merely because structures are limited, noise, vibration, glare, traffic proximity, and restriction upon property use automatically follow. Therefore it is in-

accurate to refer to protective legislation as "taking" an avigation easement.[23].

It is all of these servitudes in the aggregate which comprise an avigation easement. Yet before saying that even a servitude is "taken" by legislation, it must be admitted that no physical invasion can be considered, as such a supposed "taking" does not automatically entail a legal right of actual invasion by flight. Moreover, the legislation is subject to repeal, amendment and non-enforcement.

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23. While many cases refer to government action as "taking" property, and being therefore unconstitutional, we submit that this might be a misnomer of the real defect in such action. It is by now well settled that the government can "take" property if done in response to preservation of the public welfare. *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 284 (1943); *U.S. v. Central Eureka Mining Co.* 357 U.S. 155, 168 (1958). The real basis of the objection is not that property is confiscated but rather that it is confiscated without apparent necessity or in an unreasonable manner, such as would occur where police power is attempted to be substituted for eminent domain, and hence is either an unreasonable exercise of legislative power or is a denial of due process and equal rights. Several cases appear to have touched upon this distinction. Thus in the case of *Welch v. Swasey*, 214 U.S. 91 (1909), this Court said, in upholding a height zoning ordinance against an attack such as has been made here: "Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes deprive him of equal protection of the laws. The reasons contained in the opinion of the state court are in our view sufficient to justify their enactment: The judgment is therefore affirmed." *Id.* at 108.

An additional question is whether property may be "taken" without a physical invasion. Naturally legislation does not invade property even though it might ostensibly affect the property. *Cf. Danforth v. U.S.*, 308 U.S. 271, 286 (1939); *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155, 166 (1958); *Hempstead Warehouse Corp. v. U.S.* 98 F. Supp. 572, 573 (Ct. Cl. 1951); *Bauman v. Ross*, 167 U.S. 548, 590 (D.C.Civ. 1897). It must be remembered that legislation is administered when and as suits the executive department and relies for its continued existence upon successive legislative bodies. We submit that it may be highly dangerous to speak of legislation as "taking" property. If it is invalid it is not for the reason that it takes property but for the reason that it is wanting in reasonableness or justification.

If legislation providing safe airways greatly diminishes property values, then it may become immediately suspect. There is no excuse for imposing upon some properties a burden that all do not share. There is no emergency, and most of all there is no reason why the necessary property rights cannot be purchased. It offends common sense to maintain that, in the name of the public welfare, property rights must be taken without compensation in order that aircraft may land and take off.

The impunious destruction of property rights is not, and should never be, the objective of legislation protecting navigable air approaches. Yet, as already discussed, any legislative definition of the navigable airspace is a subjective thing, that, in the words of the court in the *Ackerman* case:

> " . . . is subject to examination for its reasonableness and to a determination as to whether it amounts to a constitutional taking of one's property." *Ackerman v. Port of Seattle, supra* at 671.

No more clearly justifiable and reasonable exercise of police power can be found than legislation for protection of the public aerial highways from encroachment or other hazards, which is designed to accomplish that purpose, and which takes reasonable cognizance of the property rights of the citizenry.

Relief Available From Oppressive Acts under the Guise of Protective Power

Against threatened trespass, injunctive relief is available. Since unlawful flight is a trespass, it must follow that, at least as against prospective unlawful flight, a property owner may defend his property by injunction.

After flights occur, the affected person has available the remedy of inverse condemnation, or as it is called in some jurisdictions, mandamus to condemn. This remedy is available in Indiana.[24]

Perhaps the most obvious relief is for the owner to obtain an exception from operation of the legislation, or a variance or permit for the uses or structures desired. If the legislation has an onerous effect upon any person, then that person has grounds for having the restriction declared inoperative as to him. In that event there would be no prohibition of the use or structure and it would be either endured or appropriated by eminent domain.

It is inevitable that any legislation attempted which categorizes and imposes restrictions upon large areas will have minor inequities. This is an accepted characteristic of zoning, and though there be unreasonable burdens in isolated instances, the zoning as a whole is upheld. *Euclid v. Ambler Co., supra.* Only if the legislation is patently unreasonable or unnecessary should the legislation as a whole be set aside. As to these lesser burdens, the law affords sufficient relief so that it is unnecessary to declare the entire ordinance invalid.

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24. The Acts of the General Assembly of Indiana of 1905, Ch. 48, Sec. 11, as found in Burns' Ann. St. (1946 Repl.), Section 3-1711, provides as follows:

"Any person having an interest in any land which has heretofore been or may hereafter be taken for any public use without having first been appropriated under this or any prior law may proceed to have his damages assessed under this act, substantially in the manner herein provided."

This is a part of the general eminent domain statute.

II

LEGISLATION ENACTED PURSUANT TO THE POLICE POWER TO PROTECT THE NAVIGABLE AIRSPACE SHOULD BE SET ASIDE ONLY IF THERE HAS BEEN AN ABUSE OF POWER IN ITS ADOPTION, AND IN NO INSTANCE SHOULD IT BE INVALIDATED BECAUSE OF ITS EFFECT IN ISOLATED SITUATIONS

It is now axiomatic that zoning legislation may control the height of structures in proper situations.[25] It is but a step further to uphold the validity and necessity of air approach height zoning. As the degree to which the police power may be exercised is founded upon the justification and reasonableness of the exercise[26], it is no surprise that air approach zoning has been upheld.

The standard by which such legislation should be judged is aptly stated as follows:

> "As a general rule hardship, limitations of use, or diminution of property values alone will not render a zoning ordinance void. This is true, even though the ordinance is harsh and results in serious depreciation of the value of the property affected by it; and financial advantage or disadvantage to owners as a result of it or its enforcement is not the test of its validity. Because of the common effect on properties coming under the general plan of the zoning ordinance, reduction in values shared by most or all the owners in a locality is not enough, of itself, to render the ordi-

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25. Gorieb v. Fox, 274 U.S. 603 (1927); Welch v. Swasey, 214 U.S. 91 (1909).

26. U.S. v. Central Eureka Mining Co. 357 U.S. 155 (1958); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1954).

nance confiscatory. On the contrary, if the limitations upon the use of the property are constitutional and *applied reasonably and fairly to all*, they are valid and the individual hardship and loss must be endured to the end that the greater advantage to the community as a whole is made possible. See McQuillin, Municipal Corporation, 3rd Ed., Vol. 8, Section 25.44, p. 98; Yokley, Zoning Law and Practice, Vol. 1, Section 35, p. 58." (Emphasis added) *Waring v. Peterson, supra* at 271.

When, as already stated, air approach protection must cover dozens of square miles of land surface area, it is inevitable that some properties will be affected to a greater degree than others. Possibly in some instances the hardship will be so great that the owner should be either compensated for his loss or permitted to avoid the restriction. This, of course, is the purpose of exceptions and variances.

In *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), this court enunciated the principle that minor defects could not lead to the invalidation of an entire zoning ordinance.

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of

> piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality." *Id.* at 395.

It therefore follows that an airport zoning ordinance should not lightly be put aside because of the purported effect in one instance. It is a very difficult thing to know where legislation will work a hardship and where it will not. The governing body must be given some latitude of discretion and its action not lightly set aside, even if infrequently there is harshness in individual situations.

> "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat' " *Id.* at 388.

Perhaps no better explanation can be found of the appropriate test of validity for legislation protecting air approaches than the statute under which the Gary Zoning Ordinance was promulgated.

> "All airport zoning regulations adopted under this act shall be reasonable and none shall impose any re-

quirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable." p. 2a, Appendix A *infra*.

Certainly one of the most obvious tests to which a court should turn is the extent to which the ordinance takes into account property uses. If the airport is located in industrial or business areas, it is reasonable to suppose that these land uses require, and will require in the future, use of the air space at considerable heights from the ground. On the other hand, if the highest and best use of the area is agricultural, it stands to reason that height restrictions can be imposed reasonably near the elevation of the ground itself, without resulting in a restriction upon the then existing land use or diminution in its value.

If the controlled area consists of a large body of water, swamp or waste land, the restriction against tall structures could reasonably be imposed even nearer to the surface.

Equally important in determining the reasonableness of the restriction is the character of the ownership of affected real estate. It goes without saying that a restriction upon the use of land owned by the airport itself is not unreasonable. By the same token, a restriction against tall structures applied to privately owned areas would not be unreasonable if an avigation easement had already been acquired over these areas.

A trial court passing upon the validity of an ordinance should not only require evidence as to land uses in the area, and land ownership of areas that will undergo a

diminution in value, but should also require evidence as to the elevations of surrounding areas. Air approach zoning characteristically limits heights in relation to the runway elevation. The effect of such zoning upon outlying areas is not clear unless and until the elevations of those areas with respect to the runway elevation are known.

The most important determination which the trial court should make is the reasonable uses to which the property is being put, and to which it might reasonably be put, and the effect that height restrictions will have upon such uses. It is apparent that heights restrictions will have a different effect upon agricultural land than upon residential or commercial land. If a height restriction of thirty or forty feet were placed upon land which was being used as grazing land, and which was adapted for no other reasonable use, then that land would probably remain unaffected by the restriction. On the other hand, it is very apparent that even a fifty or sixty feet restriction over residential or commercial real estate could seriously affect the use and enjoyment and value of it.

As a part of this same consideration, it is possible that height restrictions extending to the ground surface might be perfectly reasonable if the real estate thereby affected were a swamp which was not reasonably adapted for any other use. An owner of such land could not claim a great loss by virtue of a height restriction extending merely feet or even inches above the surface. If the restriction could be imposed only by eminent domain the damages would be *de minimus*, and litigation pointless.

Above all, it is important to recognize that air approach zoning is designed to protect the navigable air space from

further encroachment. Characteristically, such zoning excepts existing structures from its application.[27]

Existing structures must be removed through the process of eminent domain, if at all. The legislative enactment, under the authority of which this ordinance was adopted, provides in part as follows:

> "...[N]o building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and *said board may, in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided* in this act, the right to prevent the erection of, and to *require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle* or so much of any structure or trees as interfere with such gliding angle . . . ." Appendix A, p. 1a *infra*. (Emphasis added).

We contend that in light of all the foregoing considerations, it cannot be said that the Gary Ordinance is unconstitutional as being *per se* unnecessary or unreasonable. If the ordinance is in fact unreasonable or unnecessary, such matters should be brought to the court's attention, as validity in such cases becomes a question of fact, since there is no patent invalidity.

It is a long standing precept of constitutional law that the courts will indulge every presumption in favor of constitutionality.[28] Any court which sets aside legislation should point out how this presumption has been overcome.

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27. See Section 5 of the instant ordinance (R. 154).

28. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

The court in the instant case has not indicated that the presumption was ever considered, much less overcome. Most importantly, the defendant below, who asserted the unconstitutionality of the ordinance here in question, did not go forward with proof which would have enabled the trial court to set aside the ordinance, as defendant should have done.[29]

29. *Id.* at 596.

III

THE RECORD IN THE INSTANT CASE DOES NOT CONTAIN SUFFICIENT EVIDENCE FOR THE TRIAL COURT OR ANY APPELLATE TRIBUNAL TO SET ASIDE THE ORDINANCE

Perhaps the most significant observation that can be made of the sufficiency of the record in this case is that the trial court did not declare the ordinance invalid. If evidence of unreasonableness, non-necessity, unequal application or unwarranted exercise of the police power was before the court, then the court at least was not moved by it. It remained for the Supreme Court of Indiana to take that action. It is submitted that the record will not support this action.

Taken in its most favorable light, the record discloses that the airport proper was described as bounded on the north by highway 12, on the east by a railroad and on the south by a river (R. 29). Whether the City had acquired any avigation easement appears to be a field of inquiry not pursued by the defendant Commission. Any conclusion that is drawn with respect to the full extent of airport ownership and control through avigation easements must be by inference only.

The ordinance itself identifies the area of control (R. 151, 158). What the record does not reveal, however, is the altitude of the regulated area. Obviously the extent of restriction of property will depend upon the elevation of that property, since the reference point for all control is the runway elevation of 590 feet (R. 154). If the surrounding area were in a depression (which would be likely since airports are located on high ground, if possible) then a height limitation would be less restrictive than if the surrounding area were high. The only area

of which we are apprised concerning relative elevations is that area immediately involved, where it appears that the affected area is considerably below the runway itself (Pl. Ex. 15; R. 184, 47; Def. Ex. A; R. 186, 93).

Concerning the highest and best uses of the zoned areas, the record is but slightly enlightening. The area on three sides of the airport was described as "industrial" and as being zoned for industrial use (R. 130). There is some testimony concerning other obstructions which discloses that industry is in the area, though in what proximity is left in question (R. 130). The record also reveals however that to the south, where the instant case arose, the land use was "comprised of marshes, the Calumet River, also the high line South Shore Railroad." And further south yet is a residential area (R. 131).

Concerning the land most immediately involved, the record is most interesting. It appears that the present location of the river was formerly part of the airport itself and that the river was moved north to its present location to make way for the toll road (R. 53). This conclusion follows from the testimony beginning at page 53 of the record stating that the river was moved north by a distance approximating its own width, and that the airport property before the toll road construction would be shown as 175 feet farther to the south. The diagram at page 184 of the record is helpful in understanding this situation. The conclusion which must be drawn from all of this is that the present toll road rests at least largely on land that formerly was the Grand Calumet River. In fact it might be concluded that the toll road has been constructed on land to which the airport had a claim of right by riparian ownership, since it was formerly a river.

The evidence respecting the application and reasonableness of the Gary ordinance can then be summarized

thusly: The airport site is surrounded on three sides by property zoned and apparently at least partly used as industrial land, though to what extent and in what proximity it is uncertain. The elevations of these areas is unknown and therefore the extent of restriction is unknown. The land on one side is swamp, river and railroad right of way, and beyond that the land is residential, though how far beyond is again uncertain. The extent of restriction of highest and best uses of property in the area is unknown. Here it is significant to note that the record reveals no other instances of claimed harsh application. The extent of diminution of property value is unknown. The extent of avigation easements, if any, is unknown.

Upon such a record how can any court, applying the test of reasonableness,[30] conclude that the ordinance "takes" property? The trial court in fact reached no such conclusion. In order to conclude that the ordinance was invalid the Supreme Court of Indiana must have ignored the presumption of constitutionality and the "fairly debatable" rule.

The presence of existing obstructions within the zoned area could be an indication that existing land uses might be adversely affected by height restrictions. This conclusion, however, could be reached by inference only. In the instant case mention of existing obstructions by the Supreme Court of Indiana was wholly superfluous (R.

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30. "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Co., supra at 395. *Also, cf.* Waring v. Peterson, supra 271; Harrells Candy Kitchen v. Sarasota-Manatee Airport Authority, supra 443.

216). The existence of the structures, standing alone, and without reference to normal land uses in the area, does not indicate any unreasonableness in the restriction.

In light of the insufficiency of the record to support, with evidence, the conclusion of invalidity, the only other basis for so holding would be that the ordinance was patently defective. We have shown that the ordinance cannot be said to be patently unreasonable, nor in callous disregard of property rights. Any harsh application, if any be shown or inferred, can be attributed as merely incidental, through application of general restrictions to wide areas.

Any conclusion that the ordinance is patently unreasonable will leave forever a gnawing doubt whether property in this locale generally would *really* suffer diminution in value. Particularly is this true when it is remembered that variances were obtainable.[31]

At any event, the decision of the Supreme Court of Indiana did not indicate that its holding is substantiated by a finding that the ordinance was patently unreasonable, and by so failing, all airport zoning, whether reasonable or not, is placed under an ominious cloud of suspicion.

CONCLUSION

Your *amici* submit that the cause of preservation of private property against unlawful governmental interference has not been served by the opinion below. The opinion has failed to recognize that a legitimate field of governmental action exists in the area of airport zoning. To the extent that that opinion has placed the entire field of airport zoning under suspicion, the opinion does disservice to the public interest and welfare.

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31. Section 6 of the ordinance (R.154).

As we have attempted to show, satisfactory standards exist in the law for testing the validity of legislation such as this. The public interest and the interest of private property owners are adequately protected under these standards. These standards were not followed in this case nor was any evidence placed in the record which would have enabled any court to apply the standards.

We submit that the legislation involved is a legitimate exercise of the police power, and that if it is unreasonable, either through disregard of property rights or for any other reason, the record should have been made to reflect this fact.

It would be manifestly harmful to the public interest, and of no benefit whatever to the institution of private ownership, to declare this ordinance unconstitutional in this case. We therefore respectfully submit that the opinion below should be reversed.

Respectfully submitted,

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AMICI CURIAE

APPENDIX A

ACT AUTHORIZING AIRPORT ZONING

In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act, such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may, in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this act, the right to prevent the erection of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to

erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structures above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations and to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, as amended, as found in Burns' Ann. St., Section 14-423.

APPENDIX B

TALL STRUCTURES ACT

Section 1.

The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within the state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated.

Section 2.

As used in this act, unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Appendix B

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and not for profit, religious corporations, municipal corporations and bodies politic.

Section 3.

Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred (1,500) feet on either side of the extended center line of a runway or landing strip for a distance of two (2) miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty (150) feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand (3,000) feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one (1) foot vertically to every twenty (20) feet horizontally measured from such nearest boundary;

(b) at any other place within this state which will result in a structure extending more than five hundred (500) feet above the highest point of land within a one (1) mile radius from such structure.

Section 4.

No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand (1,000) feet above the highest point of land within a one (1)

mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one thousand (1,000) feet above the highest point of land within a one (1) mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty (50) feet above the height of the highest structure in existence on the effective date of this act (April 1, 1957) which is within a distance of one (1) mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected (affected) by the provisions and requirements of section 3 (a) of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty (30) days prior to any work, construction, or installation on the proposed structure.

Appendix B

Section 5.

Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specifically or within a definite area, and also the maximum height allowed for the structure.

Section 6.

Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit.

Section 7.

Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering

and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not be issued or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the application. Such determination shall become final twenty (20) days after notification thereof is served unless the applicant, within such twenty (20) days period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent.

Section 8.

Any hearing conducted pursuant to the purposes and provisions of this act shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended.

Section 9.

Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure.

Section 10.

In any instance where the commission learns or has reasonable grounds to believe that any person is erecting

or adding to a structure that would be subject to the provisions of this act but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order.

Section 11.

In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions of this act or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto.

Section 12.

The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act.

The commission shall prescribe and furnish forms necessary for the administration of this act.

Section 13.

This act shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act.

Section 14.

The provisions of this act shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof.

Section 15.

Whoever violates or fails to comply with the provisions of this act is punishable by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500). Each day that such violation or failure continues is a separate offense.

The Acts of the General Assembly of Indiana of 1957, Chapter 23, as found in Burns' Ann. St., Section 14-326 *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

MOTION OF THE AIR TRANSPORT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

BRIEF OF THE AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE

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October 9, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

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v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

MOTION OF THE AIR TRANSPORT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Air Transport Association of America ("the Association") pursuant to Rule 42[1] moves this Honorable Court to grant it leave to file a brief, as *amicus curiae,* in support of Petitioners in the above entitled matter.

INTEREST OF THE AIR TRANSPORT ASSOCIATION

The Air Transport Association is an unincorporated trade association made up of 43 air carrier members all authorized and required to provide air transportation pursuant to certificates of public convenience and

[1] Revised Rules of the Supreme Court of the United States, Adopted April 12, 1954, Effective July 1, 1954.

necessity issued by the Civil Aeronautics Board in accordance with section 401 of the Federal Aviation Act. 76 Stat. 143, 49 U.S.C. sec. 1371. One or more of our carrier members provides scheduled air transportation in every state of the union. Nine of them provide transportation of persons, property and mail into and out of cities within the State of Indiana. Official Airline Guide, City Index (September 1964).

The Articles of Association under which we operate have been approved by the Civil Aeronautics Board as consistent with the public interest. CAB, *Order No. E-14996* (March 10, 1960). Among the objects and purposes of the Association is promotion of aviation safety and, to that end, participation in proceedings before governmental agencies and courts.

One of the Association's principal activities in behalf of its carrier members is working with those local, state and Federal agencies responsible for developing a system of airports capable of meeting the growing needs of the nation. In this endeavor our chief emphasis is upon the development of airports that can be used safely and efficiently by our carrier members and the traveling public and which permit persons living or working in the vicinity of airports to do so in safety and with peace of mind.

REASONS FOR FILING A BRIEF AS AMICUS CURIAE

Zoning for the purpose of preventing hazardous obstructions from being erected in airport approach zones and prohibiting land use for purposes incompatible with safe aerial navigation is essential if the above stated objectives are to be realized. It requires full cooperation between the states, in whom the police power resides, and the Federal Government upon whom ultimate responsibility for encouragement and development of a safe air transport system devolves.

By nullifying *in toto* a zoning regulation of Gary, Indiana, clearly authorized by an enabling statute of that state and based on a model devised by the Federal Aviation Agency, the decision of the Supreme Court of Indiana being reviewed, has virtually removed Indiana from this partnership. Furthermore, it has cast significant doubt upon the future of zoning in Indiana. If this decision as written acquires the imprimatur of this Court efforts to zone around airports in other states may also be paralyzed. Such a disposition of the question by this Court, therefore, could have a serious and far-reaching impact upon the development and utility of airports across the nation. In some cases it might even result in impairing the service our carrier members are required to provide under the Federal Aviation Act.

Notwithstanding such a possibility, the question before this Court could be argued narrowly by Petitioners and Respondent, whose primary emphasis will be on their individual plights. Their dispute sounds in tort for monetary damages and their chief interests, understandably, are in the ultimate outcome of that dispute. The parties doubtlessly will address themselves to the constitutionality of zoning around airports. But there is no reason for believing that their interest or involvement in airport zoning the nation over will be as sustained as ours, which will survive this litigation regardless of its outcome.

We take no position in the narrow dispute between Petitioners and Respondent. We do assert that the decision of the Indiana Court was erroneous as a matter of law and that it portends much mischief. If permitted to file a brief as *amicus curiae,* we shall, of course, discuss the judicial decisions which, we submit, preclude a priori annihilation of zoning regulations. But we shall stress also the experience of aeronautical

users of airspace in terminal areas (approach zones) to emphasize how airport zoning bears a "substantial relation to the public health, safety, morals or general welfare." See *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 97 (1926). It is respectfully submitted that our background and experience equips us better to supply this emphasis, and thus to aid this Court, than does that of the parties to the litigation.

CONCLUSION

In view of the nation-wide interest of the Association and its carrier members in the development of safe and efficient airports, appropriately zoned, and the first-hand experience of its members in using navigable airspace, including airport approaches, it is submitted that we can be of assistance in the exploration and resolution of the question here presented. The Air Transport Association, therefore, earnestly hopes that this Honorable Court will afford it the opportunity to be of service in this matter which is so vital to the nation's air transport system by granting it leave to file a brief as *amicus curiae*.

Respectfully submitted,

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AUTHORITIES CITED

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Indiana Toll Road Commission v. *Jankovich*, 193 N.E. 2d 237 (1963) 12, 13, 17
Lawton v. *Steele*, 152 U.S. 133 (1894) 5
Lewis v. *District of Columbia*, 89 U.S. App. D.C. 72, 190 F. 2d 25 (D.C. Cir., 1951) 6
Mugler v. *State of Kansas*, 123 U.S. 623, 661 (1887) .. 11
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Schenck v. *U.S.*, 249 U.S. 47 (1919) 5
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United States v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y., 1956) 14
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U.S. v. *Perma Paving Co.*, 332 F. 2d 754 (2d Cir., 1964) 16, 27
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2 Burns, Ind. Stats. Anno.
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Federal Airport Act, as amended, 60 Stat. 170; 78 Stat. 158, 49 U.S.C. sec. 1101 4
Federal Aviation Act, 72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. sec. 1301 ..... 1, 4
Pub. L. 88-280, 88th Cong., 2d Sess., sec. 10 (March 11, 1964) 3, 20, 21, 22
Pub. L. 88-507, 88th Cong., 2d Sess. (August 30, 1964), p. 6 21
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CONGRESSIONAL REPORTS AND HEARINGS:

H.R. Rep. No. 784, 78th Cong., 1st Sess. 11 (1943) 20

H.R. Rep. No. 1002, 88th Cong., 1st Sess. 16, 17 (1963) 20, 24

S. Rep. No. 446, 88th Cong., 1st Sess. 7 (1963) 20, 22, 23

S. Rep. No. 1153, 88th Cong., 1st Sess. (1963) 21, 23

Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, 88th Cong., 1st Sess. (1963)
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CIVIL AERONAUTICS BOARD MATERIALS:

Accidents, Fatalities Within the Vicinity of the Airport, Civil Aeronautics Board Bureau of Safety, August 22, 1963 24

CAB, Bureau of Safety Statistical Review, General Aviation,
Calendar Year 1959, pp. 13, 19, 27 24
Calendar Year 1960, pp. 13, 19, 27 24
Calendar Year 1961, pp. 13, 19, 27 24

CAB, *Order No. E-14996* (March 10, 1960) 2

FEDERAL AVIATION AGENCY MATERIALS:

FAA, Air Traffic Activity 39 (Calendar year 1963) 20

National Airport Plan, Requirements for Fiscal Years 1963-67, 1963 Supplement, FAA Ex. No. 1, p. 75 (March 1963) 21

FAA-NIMLO Model Ordinance (TSO-N-18) 4

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11 Am. Jur., Const. Law, secs. 152, 267-77 ..... 5, 10

58 Am. Jur., Zoning, sec. 22 5

Annex 10 to the Convention on International Civil Aviation 11, 12 (November 1, 1963) 14

Bettman, *Constitutionality of Zoning*, 37 Harv. L. Rev. 834 (1924) 6

8 McQuillin, *Municipal Corporations* (3rd ed. Rev.)
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3 Metzenbaum, *Law of Zoning* (2d ed.), p. 1939 8

Official Airline Guide, City Index (September 1964) .. 1

Ordinance No. 2897, City of Gary, Lake County, Indiana, September, 1949 ..... 10, 18

Petition for Certiorari, p. 8 4

Port of New York Authority Handbook for Calendar year 1963, pp. 13 and 35 20

Report of the President's Airport Commission, *The Airport and Its Neighbors*, May 16, 1952 25

Rhyne, *Municipal Law* (1957)
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Rhyne, *The Legal Experience of Airports*, 11 Journal of Air Law and Commerce 297, 314 (1940) 7

State Flood-Plain Zoning, DePaul L. Rev., Summer 1963, 246, 262 23

United States Manual, Criteria For Standard Instrument Approach Procedures 25, 27 (September 1, 1956) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE

I. INTEREST OF THE AMICUS CURIAE

The Air Transport Association of America is an unincorporated trade association made up of 43 air carrier members all authorized and required to provide air transportation pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board in accordance with section 401 of the Federal Aviation Act. 76 Stat. 143, 49 U.S.C. sec. 1371. One or more of our carrier members provides scheduled air transportation in every state of the union. Nine of them provide transportation of persons, property and mail into and out of cities within the State of Indiana. Official Airline Guide, City Index (September 1964).

The Articles of Association under which we operate have been approved by the Civil Aeronautics Board ("CAB") as consistent with the public interest. CAB, *Order No. E-14996* (March 10, 1960). Among the objects and purposes of the Association is promotion of aviation safety and, to that end, participation in proceedings before governmental agencies and courts. Except for a single helicopter operator, none of our carrier members currently provide air transportation through the Gary, Indiana Airport. However, since zoning in the vicinity of airports to promote safety is of deep concern to all of our carriers and since the instant case brings the question of airport zoning before this Court for the first time and its outcome may well affect airports served by our members elsewhere in Indiana, and possibly in other states, it is of immediate interest to us.

As *amicus curiae,* we are asking this Court to reverse, limit or clarify, as it sees fit, a decision of the Supreme Court of the State of Indiana holding that an ordinance of Gary, adopted in accordance with an appropriate enabling statute of the Indiana Legislature,[1] is void *in its entirety* because it amounts to a "taking" of Respondent's property which is forbidden by the Federal Constitution and the Constitution of the State of Indiana. In the final analysis that decision seeks justification for its sweeping proscrip-

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[1] Although in another connection the Indiana Court refers to *Yara Engineering Corp.* v. *City of Newark,* 132 N.J.L. 370, 40 A2d 559-61 (1945) where it was noted that there was nothing in New Jersey's "enabling statute which authorized the enactment of an ordinance for the zoning of land solely for the use of an airport", it was nowhere held that the Gary Ordinance was not sanctioned by the Indiana Enabling Statute. See 5 Burns Ind. Stat. 14-422.

tion in decisions of this Court, including *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). We think it completely misconceives the message and spirit of both of these cases and reveals some confusion regarding the limitations on police power recognized by this Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). If the decision stands as written and is read as invalidating the Gary Ordinance in its entirety it could nullify future efforts to zone in the vicinity of airports all over Indiania and possibly jeopardize the state's Tall Structures Act.[2]

Moreover, especially if the decision becomes contagious across state lines, or appears to be blessed by this Court, it could do much mischief to the vital national objective of developing an ever improving air transport system—and it could frustrate the wish of Congress, expressed this year, in an amendment to the Federal Airport Act, to impress upon local communities and states that it is essential for them to make every reasonable effort to implement appropriate zoning in furtherance of safety and local tranquility.[3]

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[2] The Tall Structures Act regulates the location and height of structures and the use of land related thereto in localities within the state not covered by zoning regulations. 5 Burns Ind. Stat. 14.327–14.341, 1963 Cum. Supp.

[3] In March of this year Congress added to the Federal Airport Act a requirement that the Administrator of the Federal Aviation Agency, as a condition precedent to approving a project as eligible for Federal assistance under the Act, obtain a written assurance from the recipient community that, to the extent reasonable, zoning laws restricting land use in the vicinity of the airport will be adopted. Pub. L. 88-280, 88th Cong., 2d Sess. sec. 10 (March 11, 1964). This amendment, which is explored in some detail at pp. 21-24, *infra*, confirmed the Administrator's long standing practice of insisting upon such a commitment from Airport

Encouragement and development of a nation-wide air transport system is embodied in two Congressional acts, the Federal Aviation Act and the Federal Airport Act.[4] Encouragement and development of such a system calls for Federal and state partnership. The Federal commitment is immense and the Federal undertaking has been aided and supplemented at the local level by use of the police power, historically said to reside in the several states. In addition to the bedevilments noted, the decision below, if it is upheld without qualification, could remove Indiana from this partnership.

We are interested only in having this Court make certain that the action taken below (invalidation of the Gary Ordinance in its entirety) is not read as indicating that a state's police power cannot be used to zone in the vicinity of airports. We take no position as to whether that ordinance may be considered a "taking" or otherwise void, as to the Respondent's identifiable real estate if, indeed, it is applicable at all against the Toll Road Commission.[5]

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sponsors. To aid sponsors in formulating zoning regulations the Administrator in conjunction with the National Institute of Municipal Law Officers ("NIMLO") adopted a model ordinance (effective in February, 1946) based on Technical Standard Order N-18, the technical document used by the Administrator to determine obstructions around airports.

[4] Federal Aviation Act, 72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. sec. 1301.

Federal Airport Act, 60 Stat. 170, 78 Stat. 158, 49 U.S.C. sec. 1101.

[5] We do not know whether or not the Indiana Toll Road Commission is possessed of such governmental character as to put it beyond the Ordinance. The trial court in Indiana is said to have rejected the supervening act contention. Petition For Certiorari, p. 8. (Cf. R. 12 and R. 13.) The Annotation on the subject in 61 A.L.R. 2d 970-78 raises a question.

II. ARGUMENT

A. The Indiana Court's Decision Was Wrong as a Matter of Law and is in No Sense Required or Sanctioned By Prior Decisions of This Court.

As we have already noted, this decision, if upheld, will represent a setback in the use of a state's police power to zone around airports even when it is done to fulfill a compact with the Federal Government found by Congress and the Legislature of that state to be for the public good. Traditionally police power has been exercised to require or forbid certain actions by individuals or groups of individuals when the overall good of the community, and with it the good of the individuals affected, would be served. To be valid, such enactments must be reasonably related to the public health, general welfare, safety or morals of the community.[6] Not all exercises of police power have been upheld. But it has been used validly for many purposes, even to put conditions on freedom of speech and assembly.[7]

Statutes and regulations also have placed restrictions on the use of property as well as on personal freedom. Zoning ordinances come under this heading. Subject, of course, to the aforesaid threshold requirement, to factual determinations in individual cases (*e.g.*, consideration of the general character of the area and neighborhood affected) and to a weighing of public gain against individual hardship, zoning has emerged as a means of keeping liquor stores away

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[6] *Lawton* v. *Steele*, 152 U.S. 133 (1894); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); 11 Am. Jur., Const. Law, secs. 267-77.

[7] *Schenck* v. *U.S.*, 249 U.S. 47 (1919); 58 Am. Jur., Zoning, sec. 22; 8 A.L.R. 2d 1964.

from churches and schools,[8] preventing industrial plants from destroying residential communities[9] and restricting the heights of buildings and other structures that blot out sunlight and congest city sidewalks.[10] Zoning has been used too for purposes other than heading off portentous evils. In some instances economic and aesthetic benefits have been bestowed upon communities by adoption of appropriate zoning regulations.[11]

Zoning laws are of relatively modern origin as this Court noted in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In 1926 this Court was able to catalogue a number of regulations which it said probably would

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[8] Rhyne, *Municipal Law*, secs. 32-52 (1957); 96 A.L.R. 778 (1935).

[9] *Id.*, secs. 32-56.

[10] *Euclid* v. *Ambler*, *supra*.

[11] *Lewis* v. *District of Columbia*, 89 U.S. App. D.C. 72, 190 F. 2d 25 (D.C. Cir., 1951); 8 McQuillin, *Municipal Corporations*, secs. 25.29–25.31 (3rd ed., Rev.). This Court has recognized aesthetics as among those values to be preserved in the interest of general welfare. In *Berman* v. *Parker*, 348 U.S. 26 (1954), the exercise of the power of eminent domain by a District of Columbia land agency was upheld where the objectives of the land agency were to keep the community beautiful. This Court said:

> "The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. Missouri, 342 US 421, 424, 96 L ed 469, 472, 72 S Ct 405. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

For an informative discussion of some of the indirect benefits to the general public that can be achieved through zoning, see Bettman, *Constitutionality Of Zoning*, 37 Harv. L. Rev. 834 (1924).

have been rejected as arbitrary and oppressive a century before but which, in the light of conditions existing at the time of that decision, seemed both wise and necessary and were uniformly sustained. *Id.* at 386, 87.

Even when its relatively modern origin is considered, much zoning took place before airports were heard of or during the days of their primitive development. So, in the beginning, zoning was not associated with airports and airports were not associated with zoning. But as aviation began to develop and airports began growing across the nation, it was quite natural for local authorities, encouraged by the Federal Government, to consider zoning in the vicinity of airports.[12] Height zoning around airports is but an extension of height zoning elsewhere. It is not a type of zoning different in kind from all others. In effect, it does no more than limit heights in "airport districts" for the benefit of the community as a whole, including individual property holders who give up some rights to benefit the community, of which they are a part.[13] Height limitations and land use restrictions have long been recognized in "business districts", "residential districts" and "industrial districts" and have made the same demands upon property situated therein as height limitations make upon property situated around airports.

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[12] Alameda County, California was the first to do so in 1928. The need for such zoning was recognized by the Federal Government (Civil Aeronautics Administration and predecessor) in 1930 and again in 1938. Rhyne, *Municipal Law*, sec. 22-22 (1957).

[13] Rhyne, *The Legal Experience of Airports*, 11 Journal of Air Law and Commerce 297, 314 (1940); 8 McQuillin, *Municipal Corporations* (3rd ed. Rev.) secs. 25.110–25.118.

Of course, limitations on the uses to which property may be put in any of these areas are expressed in terms relevant to the activities expected to be conducted within the respective areas. Since airport activities consist of aircraft landings and take-offs, it follows that height limitations and restrictions on communication propagations that would distort radio navigation, are important examples of the kinds of uses to which property situated near airports should not be put if public safety is to be considered. On their face ordinances imposing such limitations, restricting the use which an individual may make of his property in the proximity of an airport, are reasonably related to the safety and welfare of the community. The denial to an individual of *absolute* freedom to use his property as he sees fit, therefore, does not seem too harsh. Cf. *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). And, if any distinction is to be made among the grounds on which the exercise of police power is justified, surely an ordinance based upon considerations of safety (the preservation of life as well as property) must be accorded the highest standing.

In *Euclid* v. *Ambler, supra,* this Court was asked to strike down *in its entirety* a comprehensive zoning ordinance adopted by the Village of Euclid, Ohio. That ordinance, among other things, limited the height of buildings within specified zones and excluded apartment houses, business houses, retail stores, shops and other like establishments from residential districts.[14] In its disposition of the case, this Court observed that decisions in the states were numerous and conflicting, some holding that such restrictions bear a rational relationship to the health and safety of the community,

[14] See 3 Metzenbaum, *Law of Zoning* (2d ed.), p. 1939.

some holding that they do not. Citing with approval *Aurora* v. *Burns,* 319 Ill. 84, 93, 95, 149 N.E. 784, and *State ex rel. Civello* v. *New Orleans,* 154 La. 282, 83, 97 So. 440, both in the first group, this Court noted such things as economy in the matter of paving streets, expediting local transportation, heading off interference with the circulation of air and sun rays and avoiding disturbing noises from automobiles as objectives that could not be put outside the valid exercise of police power. Speaking through Mr. Justice Sutherland, this Court said:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, *as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.* Thomas Cusack Co. v. Chicago, 242 U.S., pp. 530, 531, 61 L. ed. 475, 476, L.R.A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594; Jacobson v. Massachusetts, 197 U.S. 11, 30, 31, 49 L. ed. 643, 651, 652, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.
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> "It is true that *when,* if ever, the *provisions* set forth in the ordinance in tedious and minute detail, *come to be concretely applied to particular premises including those of the appellee,* or to particular conditions; or to be considered in connection with specific complaints, *some of them,* or even many of them, *may be found to be clearly arbitrary and unreasonable.*
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> "In the realm of constitutional law, especially, this Court has perceived the embarrassment

> which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application to extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. *This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police,* with which we are here concerned." 272 U.S. at 397. (Emphasis supplied.)

Contrary to these clear instructions, the Indiana Court nowhere spelled out wherein it felt the Gary Ordinance failed to bear a rational relationship to the general welfare, health, safety and morals of the people of Gary. As a strict matter it did not even sound the incantation. Instead, and despite its own reference to *Euclid,* which points exactly the other way, it nullified the entire ordinance.[15]

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[15] No treatment was given to the severability clause of the ordinance. Section 12 of the Gary Ordinance says:

> "If any of the provisions of the ordinance or the application thereof to any person or circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable." R. 157.

It is fundamental that a statute may be constitutional in one part and unconstitutional in another part, especially when a severability clause is included in it, subject only to the natural corollary that it may sometimes be impossible to separate the parts. Cases supporting this principle are almost too numerous to cite. They are collected in 11 Am. Jur., Const. Law, sec. 152. *Watson* v. *Buck,* 313 U.S. 406 (1941) holds that a Federal Court cannot invalidate a state statute containing a severability clause.

The Indiana Court cites *Euclid* v. *Ambler, supra,* in conjunction with *Mugler* v. *State of Kansas,* 123 U.S. 623, 661 (1887), presumably to support Respondent's right to question the constitutionality of the ordinance without first seeking a variance, and to justify its own action in going beyond the stated purpose of the ordinance to look at its substance. We are not questioning the court's consideration of the constitutional argument or its refusal to be "bound by mere form." We are concerned, however, with the outcome—with the apparent inclination to apply different standards in deciding the validity of zoning regulations in the vicinity of airports than this court has applied in other zoning cases; *e.g.,* in *Euclid.* The Gary Ordinance was not said to be unrelated to general welfare and safety. It was not held to be a "taking" as applied to Respondent's property (for which compensation should be paid or, perhaps, against which the applicable section is inoperative) but otherwise a valid exercise of police power. It was simply eliminated.

The decision is unclear as to the rationale and authority on which the case was decided. The court seems to say that the ordinance per se did the "taking", as the statute in *Pennsylvania Coal Co.* v. *Mahon, supra,* was said to do. On the other hand, in the opinion there is much discussion of *Causby* and *Griggs* both of which held that a "taking" occurred as a result of frequent flights of aircraft over specific real estate at very low altitudes. And, in rejecting Petitioners' argument that the Toll Road Commission should have protected itself by inverse condemnation proceedings under the Eminent Domain Statute,[16] the

[16] 2 Burns, Indiana Statutes Annotated, secs. 3-1706–3-1711.

court said that the "taking" must be an accomplished fact to permit such an action and that it could not be an accomplished fact since "actual encroachment" was impossible because the power lines adjacent to the toll road "are much higher than the toll road." R. 216, 17.

In *Pennsylvania Coal Co.* v. *Mahon, supra*, this Court held that a statute of that state, admittedly destroying contract rights, and denying a mining company all rights to mine the coal that it had reserved by contract, for the benefit of "a single private house" located on the surface, was such a diminution of previously existing rights that it had reached the magnitude where "there must be an exercise of eminent domain and compensation to sustain the act." This decision, rendered four years before the decision in *Euclid*, itself stresses that the question of "taking" turns upon particular facts. Actually it helped pave the way for *Euclid* by noting that some values are enjoyed under an implied limitation. Mr. Justice Holmes wrote:

> "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, *some values are enjoyed under an implied limitation, and must yield to the police power.* But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.*" 260 U.S. at 413. (Emphasis supplied.)

If the *Euclid* decision had not instructed that zoning regulations "be concretely applied to particular premises" the *Pennsylvania Coal* case, upon which the Indiana Court relies, seems to have suggested it. And, of course, *Euclid* did chart the course that this Court wanted followed in zoning cases.

Rather than follow that course by limiting its invalidation of the Gary Ordinance to those provisions which, when "concretely applied" to Respondent's property, seem "arbitrary and unreasonable", the court below sought to distinguish between what it called "regulation under the police power which can be modified at the discretion of the regulating authority" and "'taking or appropriating of private property by the government for a specific public use." R. 214. There is no elucidation of the court's conclusion that the Gary Ordinance falls in the latter category. The court does not say why the availability of a waiver does not operate to permit modifications if circumstances so dictate, at least insofar as specific property owners are concerned.[17] It merely states that "the taking or appropriating of private property by the government for a specific public use" can be effected only if compensation is provided. *Pennsylvania Coal* and *Griggs* are cited as authority for the conclusion. There is nothing in *Pennsylvania Coal* to support the thesis that the City of Gary would have to condemn and pay for all land extending six miles out

[17] This aspect of the ordinance was treated summarily in the decision below. The court's anxiousness to reach the constitutional issue may well have denied an administrative remedy to Respondent. If, as the court observed, the adjacent power lines shielded the toll road, a waiver almost surely would have been granted.

before it could adopt the ordinance.[18] And, as indicated above, *Griggs* held only that "regular and almost continuous daily flights", passing within 30 feet of the landowner's residence on take-off and within 53

[18] The opinion cites *United States* v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y., 1956), and *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex., 1956) as evincing recognition by the Federal government that easements for the glide angle needed for landing and takeoff must be acquired by condemnation proceedings and payment of just compensation. To be sure there are times when the government regards it essential to acquire air easements and no one can doubt that a condemnation proceeding and just compensation are necessary to acquire those easements. But it can not follow, without doing violence to the rationale of *Causby*, that easements must be acquired to permit all landings and takeoffs. In *All American Airways* v. *Village of Cedarhurst*, 106 F. Supp. 521 (U.S.D.C., E.D., N.Y., 1952), *aff'd.* 201 F. 2d 273 (2d Cir., 1953) it was contended that authorization in the Federal Aviation Act for the Administrator to acquire "easements through or other interests in immediately adjacent" airspace meant just that. Judge Rayfiel rejected the contention saying:

> "I do not believe that Congress intended that the 'Administrator' should be required to condemn or otherwise acquire the airspace adjacent to every plot of land over which planes under its supervision and control would be obliged to fly in landing at or leaving an airport. Even if that were the intent of Congress the remedy of an affected property owner is by an action for damages in the Court of Claims, as was done in the Causby case, supra." 106 F. Supp. at 523.

If it were otherwise airports would become the size of the most extended glide slope needed for each runway and, in some cases, would reach upward well in excess of a thousand feet. In the case of those airports having Instrument Landing Systems ("ILS") this would mean condemning approximately four or five miles for each ILS runway. For example, an outer marker five miles out with a 2½° glide slope will describe a triangle whose height is 1330 feet. Annex 10 to the Convention on International Civil Aviation 11, 12 (November 1, 1963) and United States Manual, Criteria For Standard Instrument Approach Procedures, 25, 27 (September 1, 1956). This is not the direction of *Causby* and *Griggs*.

feet of it when landing, made the property unusable as a residence and so amounted to a "taking" for which the Greater Pittsburgh Airport had to pay. Following the landmark decision in *Causby*, the *Griggs* case recognized ownership of as much space above the ground as a landowner can put to reasonable use. It was reasonable use as a residence that was "taken" from landowner Griggs. We have already suggested, that it may well be that the Gary Ordinance purported to deprive the Toll Road Commission of the reasonable use of its property for constructing an expressway. We take no position in that dispute. Actually the ordinance did not prevent construction of the freeway as the frequent low flying airplanes prevented landowners Causby and Griggs from using their properties. But suppose it had done so and is regarded by this Court as a "taking." It would not follow necessarily that all property within the several established zones was "taken", or even reduced in value.

This Court has recently made it very clear that an otherwise valid ordinance is not rendered unconstitutional merely because it deprives the property of its most beneficial use. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). There it was said of an ordinance prohibiting excavations below 2 feet above maximum ground water level:

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of

its most beneficial use does not render it unconstitutional. Walls v. Midland Carbon Co., 254 US 300, 65 L ed 276, 41 S Ct 118 (1920); Hadacheck v. Sebastian, 239 US 394, 60 L ed 348, 36 S Ct 143, Ann Cas 1917B 927 (1915); Reinman v. Little Rock, 237 US 171, 59 L ed 900, 35 S Ct 511 (1915); Mugler v. Kansas, 123 US 623, 31 L ed 205, 8 S Ct 273 (1887); see Laurel Hill Cemetery v. San Francisco, 216 US 358, 54 L ed 515, 30 S Ct 301 (1910)." 369 U.S. at 592, 93.

In a decision of earlier vintage this Court upheld action by the Secretary of War which prevented a riparian owner from using his property in the manner he regarded most beneficial, *i.e.*, for construction of a wharf. The Secretary had determined that it was "essential to the preservation and protection" of the harbor involved that a new harbor line be established. To do so required demolition of a portion of an existing wharf for which no compensation was paid. This Court held that the Secretary's action had not reached the point that it could be regarded as "arbitrary or wanton." *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 68 (1915). See also *U. S.* v. *Perma Paving Co.*, 332 F. 2d 754 (2d Cir., 1964).

So we are back to *Euclid* where we were told that various provisions of the ordinance must be "concretely applied to particular premises", found "clearly arbitrary and unreasonable" and unrelated to "public health, safety, morals and general welfare" before the ordinance can be declared unconstitutional and void.[19]

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[19] Our jurisprudence, of course, is one of judicial restraint when it comes to overturning legislative acts on the basis of the Constitution. A good modern day example of the reluctance of a Federal Court to upset the exercise of police power is *All American*

There is no single lesson to be learned from an exhaustive analysis of state decisions on zoning. It is noteworthy, however, that some courts of last resort in other states have reached opposite conclusions when height zoning, which is essentially what is involved here, was in issue. Illustrative are decisions in Wisconsin and Florida, the former an earlier decision upholding height limitations imposed on buildings for fire prevention purposes, the latter a recent one upholding height limitations in specified zones around an airport to protect air navigation.

In *Atkinson* v. *Piper, et al.*, 181 Wisc. 519, 195 N.W. 544 (1923), a statute passed by the Wisconsin Legislature limiting the height of buildings in cities of one class to 125 feet and those of another class to 100 feet was held to be a valid exercise of the state's police power. Quoting from this Court's opinion in *Hadacheck* v. *Sebastian, supra,* the Wisconsin Court stressed how imperative it is that police power, unless it is

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Airways v. *Village of Cedarhurst,* 201 F. 2d 273 (2d Cir., 1953) where the Second Circuit called for a trial and a complete record before it would consider invalidating an ordinance prohibiting flights over the village below specified altitudes, albeit in compliance with regulations of the Administrator. That Court said:

> " . . . On the other hand, we do not think we should take the position urged by the plaintiffs, and substantially followed by the district court, of declaring the ordinance clearly invalid at this preliminary stage of the proceedings. Before a trial we are not in a position to find that those defendants who are land owners cannot establish their claims of trespass and nuisance . . ." 201 F. 2d at 276.

True the matter before the Supreme Court of Indiana was not in the "preliminary stage of the proceedings." On the other hand, it does not appear that other remedies available to Respondent, remedies that would have permitted the ordinance to stand, were adequately explored. For instance, note the rejection of inverse condemnation. R. 216, 17.

arbitrarily exercised, be upheld even though it may seem harsh on some individuals.

In *Harrell's Candy Kitchen* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (1959), a landowner wanted to add height to a building in the vicinity of the municipal airport. The new height would exceed the 27.64 feet above level ground permitted by a Florida statute at that location. Harrell's property was situated to one side of the extended center line of a principal runway in an approach area. Like most real estate subject to the Gary Ordinance,[20] and other ordinances based on the FAA model, it did not lie directly in the path of the runway. In other words, normally there would be no flights passing over this parcel of real estate. The Supreme Court of Florida never seemed to doubt that this act of the legislature was a valid exercise of police power. That court said:

> "There is no longer any question concerning the power of the Legislature to authorize agencies of the government to adopt and enforce zoning regulations. We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and

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[20] The ordinance establishes four zones. Only in two of them, the Outer Area Approach Zone and the Inner Area Approach Zone are there likely to be regular over-flights. And only in the Inner Area Approach Zone, controlled by the 40 to 1 slope, are there likely to be over-flights very close to the ground. See Ordinance (R. 153, 54) and Gary Airport Zoning Map of April 12, 1949 (R. 158).

landing as well as those living in the vicinity thereof. In many cases this Court has upheld the exercise of the police power by counties and municipalities in the enactment of zoning regulations restricting height, number of stories, size of buildings and other structures, percentage of lots that may be occupied, the size of courts and other spaces, the density of population and the location of buildings and structures and land and water for trade, industry and other purposes. *There has been much litigation in the field of zoning, particularly in Florida, and the jurisprudence in that field has been extensively developed. These well settled principles now so firmly established with reference to municipal and county zoning apply equally to airport zoning.*" 111 So. 2d 443. (Emphasis supplied.) Cf. Rhyne, *Municipal Law*, sec. 22-22 (1957); McQuillin, *Municipal Corporations*, sec. 25.25.

B. Zoning in the Vicinity of Airports Is Essential if the Nation's Policy of Encouraging the Development of Airports Safe Both for Aeronautical Users and for Airport Neighbors is to Continue.

A necessary concomitant to a system of airports adequate to meet the nation's air transportation needs is freedom for local authorities, in partnership with the Federal Government, to adopt reasonable zoning regulations designed equally to protect persons and property moving by air and persons living, working and congregating in "airport districts." Such ordinances should not be overturned except in the most extreme cases. They should not be held invalid simply because they work a hardship on some individuals. In all cases public gain must be weighed against individual loss.

If the Gary Ordinance is consigned to oblivion and the airport forced to close, or hobble along with one

runway's utility greatly reduced, there will be little or no immediate impact upon the air transportation provided by air carrier members of this *amicus curiae*. But the "general aviation" operations handled by that airport will have to be absorbed elsewhere. See H.R. Rep. No. 1002, 88th Cong., 1 Sess. 16, 17 (1963). If all zoning ordinances in Indiana based on the FAA model are likewise destined for oblivion the impact upon air transportation becomes clearer. If Indiana's fate is multiplied by fifty the prospects of protecting approaches to the nation's airports are dim.[21] The alternative, indifference to safety and general welfare, is even more distressing.

As far back as 1943, the House Committee on Interstate and Foreign Commerce noted that "hundreds of millions of dollars are being spent on airports." H.R. Rep. No. 784, 78th Cong., 1st Sess. 11 (1943). The Federal Airport Act became effective in 1947 and since then a total of $741,723,839 has been made available by the Federal Government to states and local communities in net project funds. Grant agreements, like the one Gary undertook with FAA, have committed $695,171,206 of that sum and $550,609,855 actually have been spent. S. Rep. No. 446, 88th Cong., 1st Sess. 7 (1963). Early this year Congress appro-

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[21] Under the rationale of the decision below a two thousand foot "Eiffel Tower", three miles from Kennedy International Airport could immobilize a principal runway at that vital gateway through which some 12,754,000 passengers moved last year. Port of New York Authority, Annual Report of Airport Activity for Calendar Year 1963, pp. 13 and 35. An obstruction comparably situated could have an equally deleterious effect at Chicago's O'Hare Field where air carrier operations alone number nearly 1000 each day. FAA, Air Traffic Activity 39 (Calendar Year 1963).

priated an additional 150 million[22] bringing the total Federal involvement under the Airport Act alone just under the billion dollar mark. To receive Federal aid under the Act, states and local communities must put up matching funds equal to a minimum of 50% of the grant. Over-all Federal and state commitment to civilian airport development is already well over a billion dollars. A need for another billion (specifically $1,082,439,000) over the next five years is reflected in FAA's National Airport Plan recently submitted to Congress.[23]

The Federal concern with airport development, and its deep involvement in it, rests primarily upon the recognition of Congress, in common with this Court, that "the airplane is a part of the modern environment of life" (328 U.S. 266) and that airports are beneficial, not to special groups alone, but to the whole nation. In its Report to accompany S. 1153, amending the Federal Airport Act, the Senate Commerce Committee made this finding:

> "Airports are not just local assets. They do not just benefit the large airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens. Airports play an indispensable role in national defense, e.g., in World War II over 429 civil airports were made available to the Military Establishment. They are continually available to the military in times of national emergency. The use of civil airports,

[22] Authorized by Pub. L. 88-280, footnote 3, p. 3, *supra;* appropriated by Pub. L. 88-507, 88th Cong., 2d Sess. (August 30, 1964), p. 6.

[23] National Airport Plan, Requirements for Fiscal Years 1963-67, 1963 Supplement, FAA Ex. No. 1, p. 75 (March 1963).

however, is not limited to times of war and national emergency." S. Rep. No. 446, *supra*, at 17.

Congress is crucially concerned that everything be done, that can reasonably be done, to permit the airplane to take-off, fly and land safely. Relying on the Administrator's expert judgment and advice that aircraft are in critical configuration during take-offs and landings, Congress very recently ratified the Administrator's historical attempts to enlist local communities in the Federal effort to keep approach areas free of "hazards." Just last year it wrote into law the requirement, cited at page 3, *supra*, that the Administrator, as a condition to grant agreements, satisfy himself that a reasonable attempt will be made to zone around all airports listed on the National Airport Plan. This should remove any lingering doubts that Congress believes that airport zoning is reasonably related to public safety and general welfare.

Specifically the amendment adds a new paragraph to section 11 of the Federal Airport Act so that the section entitled "Project Sponsorship" now reads:

> "As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—
>
> * * *
>
> "(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft . . ." Pub. L. 88-280, *supra*.

And to show conclusively Congress' full awareness of the problem:

> "As noted previously, other than extending the act an additional 3 years and incorporating some minor amendments of a strictly technical nature, the committee has approved only one new provision. This provision would amend section 11 of the Federal Airport Act so as to provide, as a condition precedent to any grant that the Administrator of the Federal Aviation Agency satisfy himself that reasonable effort, including enactment of zoning laws, has been made to restrict the use of land adjacent to airports so as to make it compatible with the operation of the airport.
>
> "A number of witnesses questioned the desirability of this provision and were apprehensive as to its implications and the scope of its application. The committee appreciates the concern of these witnesses but does not share their fears that any unreasonable burdens will be placed on the local communities or the airport operators.
>
> * * *
>
> "The growing seriousness of the aircraft noise problem cannot be ignored or dismissed with the attitude that time will eventually effect a solution. Within reason, every present means to alleviate noise should be employed. The committee is convinced that the single most important means is to insure adequate zoning and that the proposed amendment will contribute to such an effort." S. Rep. No. 446, *supra*, at 20-22.[24]

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[24] The colloquy between Senator Monroney and Administrator Halaby regarding Dulles International Airport during the latter's testimony on S. 1153 is incisive. It shows, *inter alia*, that the mere purchase of huge tracts of land does not solve the problem—that reasonable zoning is essential too, if the public good is served. Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, 88th Cong., 1st Sess., ser. 10 at 20-25 (1963). See *State Flood-Plain Zoning*, DePaul L. Rev., Summer 1963, 246-262.

The Report of the House Committee on Interstate and Foreign Commerce is *in pari materia*. H.R. Rep. 1002, *supra*, at 6.

CAB's accident investigation statistics greatly illuminate the relationship of airport zoning to public safety and welfare. They go a long way toward explaining why national policy encourages airport zoning. An excess of two thirds of all aircraft accidents have happened either on or within 5 miles of airports. This is uniformly true year after year. For example, during the 5 year period 1957 through 1961, CAB informs that 66% of all air carrier accidents and fatalities occurred within this area. In the case of general aviation the figure was 72.6% for the three year period 1959 through 1961.[25]

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[25]

Year	Total Number of Accidents	Number of Accidents on or Within 5 Miles of Airport	Percentage of Accidents on or Within 5 Miles of Airport
U.S. Air Carriers:			
1957	112	71	63
1958	91	64	71
1959	101	61	60
1960	90	61	67
1961	84	61	72

Accidents, Fatalities Within the Vicinity of the Airport, Civil Aeronautics Board Bureau of Safety, Aug. 22, 1963.

General Aviation (Small Fixed Wing):			
1959	4149	2893	69
1960	4384	5307	75
1961	4168	3096	74

CAB, Bureau of Safety Statistical Review, General Aviation, Calendar Year 1959, pp. 13, 19, 27; Calendar Year 1960, pp. 13, 19, 27; Calendar Year 1961, pp. 13, 19, 27.

Honorable Alan S. Boyd, Chairman of the Civil Aeronautics Board, testified to the same effect last year in supporting amendments to the Federal Airport Act. Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, 88th Cong., 1st Sess., ser. 10 at 29 (1963).

President Truman revealed an awareness of this pattern in 1952 when he asked General J. H. Doolittle to serve as Chairman of the President's Airport Commission which included the Administrator of Civil Aeronautics, Mr. Charles F. Horne, and Dr. Jerome Hunsaker, Head, Department of Aeronautics, Massachusetts Institute of Technology. The Commission was asked to look into the problem of airport location and use. The President's letter to General Doolittle, appointing him Chairman, opened with these words:

> "For some time now, I have been seriously concerned about airplane accidents, both commercial and military, *that have occurred in the take-off and landing of aircraft,* especially in heavily populated areas. I have been concerned about the loss of life and I have been concerned about the anxiety in some of our cities. I have decided to set up a temporary President's Airport Commission to look into the problem of airport location and use . . ." Report of the President's Airport Commission, *The Airport and Its Neighbors,* p.v., May 16, 1962. (Emphasis supplied.)

The so-called Doolittle Report submitted to the President, no less than the statistics from CAB, attests the relationship between airport zoning regulations and public safety and general welfare. In a section entitled "An Analysis of Risk" the report said:

> "An airport exists within a community for the use of aircraft supplying the city with services necessary to its welfare. When paths of flight to and from the airport pass over inhabited areas, operations can constitute a potential hazard to people who live or work in the airport approach zones. Similarly, any type of construction in the approach zone represents a potential risk to the aircraft and its occupants on take-off and landing,

while tall structures under the airways create a hazard to navigation dangerous both to people in the airplane and on the ground.

"*The possibility of* an aircraft *crashing* into one's home is *greatest* in the narrow, elongated strip of land that underlies *the approach zone* to runways on airports. Commercial (air carrier) and military airplanes that have caused death or injury to persons on the ground near airports have, in most cases, struck close to the projection of the centerline of the runway and within the approach zone (fig. 7)." *Id.* at pp. 49, 51. (Emphasis supplied.)

It would contradict all of this experience to hold that zoning regulations imposing height limitations in airport approaches are not substantially related to public safety and general welfare. Without offending common sense, it cannot be said that any regulation is more immediately connected with safety than one designed to prevent aircraft, approaching for a landing, from colliding with an obstruction and spreading wreckage over adjacent property. In recognition of governmental responsibility for the safety of people living near airports, no less than for those who fly,[26] the Administrator and Congress have encouraged local communities to undertake appropriate zoning around airports. In recognition of their obligations to consider public safety and the general welfare, a number of communities, including Gary, Indiana, have responded to the Federal urging.

In Gary's case, the Supreme Court of Indiana, though failing to say that the ordinance in question

[26] Hearings Before the Aviation Subcommittee of the Committee on Commerce of the Senate, footnote 24, *supra*, at 22 and 23.

is not substantially related to public safety and welfare, has viewed it, not as a conscientious attempt to make the environs of an airport a safe place to live and work, but as an effort to circumvent the Constitution and take private property under the guise of the police power. If a decision so postulating is allowed to supersede the test this Court established in *Euclid* and become the norm by which zoning around the nation's airports is to be judged, then surely Mr. Justice Cardozo was right when, discussing airports, he wrote for the Court of Appeals of New York: "The dwellers within the gates, even more than the stranger from afar, will pay the price of blindness." *Hesse* v. *Roth*, 249 N.Y. 436, 164 N.E. 342 (1928).

A strange logic would protect a river's channel but permit its harbors to fill in. A stranger Constitution is needed to allow a riparian's wharf to be razed without recompense but permit a hazard to go up in navigable airspace beyond the reach of police power.[27]

III. CONCLUSION

The Supreme Court of Indiana erred in treating the Gary Ordinance as a "taking" of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and a "taking" for public use without compensation in violation of Article 1, sec. 21 of the State Constitution, rather than as a zoning regulation, the objectives of which are substantially related to public safety and the general welfare, and thus a valid exercise of the states' police power. Assuming, *arguendo*, that as applied to Respondent's property, particular sections

[27] Cf. *Greenleaf-Johnson Lumber Co.* v. *Garrison*, *supra*, and *U.S.* v. *Perma Paving Co.*, *supra*, with the decision below.

of the ordinance are arbitrary and unreasonable, the court erred in not confining its decision to such a specific application rather than declaring the ordinance void in its entirety.

Wherefore, this *amicus curiae* urges this Court to reverse, limit or clarify the decision of the Indiana Supreme Court to make clear that it does not regard zoning around airports as different from other types of zoning and that airport zoning, including that based on the FAA model, should be judged constitutionally as specified in this Court's opinion in *Euclid* v. *Ambler, supra,* and not treated a priori a "taking or appropriating of private property for a specific public use."

IV. SUMMARY OF ARGUMENT

Police power, which resides in the several states, has been used for many purposes ranging all the way from limiting freedom of speech to restricting the height of buildings for aesthetic purposes. *Supra,* pp. 5-7. Statutes and regulations adopted pursuant to police power have been held valid when they were shown to be substantially related to "public health, safety, morals or general welfare." *Supra,* pp. 6-10.

Noting that zoning laws are of relatively modern origin, this Court, in *Euclid* v. *Ambler, supra,* upheld the constitutionality of a comprehensive zoning regulation, among other things, limiting the height of buildings in specified areas. That decision charted the course to be followed in judging zoning regulations. There it was said that before such regulations can be declared unconstitutional, they must be "concretely applied to particular premises" and the provisions so applied must be found "clearly arbitrary and unreasonable, having no substantial relation to

the public health, safety, morals, or general welfare". *Supra,* pp. 8-10.

The Supreme Court of Indiana, in deciding the instant case, made no effort to follow the instructions of *Euclid.* Instead of treating the several provisions of the Gary Ordinance separately and applying each concretely to Respondent's premises, that court declared the whole ordinance unconstitutional as a "taking" of private property without compensation under the guise of police power and thus violative of the Fourteenth Amendment to the United States Constitution and Article 1, sec. 21 of the State Constitution. Nowhere did the court indicate wherein the ordinance, which was based on a model devised by FAA, the Federal Agency responsible for promoting aviation safety, was not substantially related to public safety and general welfare. *Supra,* pp. 10 and 11. Cf. *Harrell's Candy Kitchen* v. *Sarasota-Manatee Airport Authority, supra.*

We take no position as to whether specific provisions of the Gary Ordinance may be considered a "taking" or otherwise void when applied to Respondent's identifiable real estate. We submit that the court below erred in striking down the ordinance *in toto.*

In addition to its erroneous treatment of zoning in the vicinity of airports as different from other zoning, the decision below is based upon a misconception of decisions of this Court in which a "taking" was said to have occurred — particularly *United States* v. *Causby, supra,* and *Griggs* v. *Allegheny County, supra,* where frequent over-flights at very low altitudes were held to "take" the reasonable use of property as a residence. (Note *Goldblatt* v. *Town of Hempstead, supra,* where it was held that an ordinance is

not unconstitutional merely because it deprives property of its most beneficial use.) Moreover, if it is not the product of confusion, the decision below applies a double standard for measuring "taking"—the ordinance was declared a "taking" per se, yet "actual encroachment" by aircraft was said to be needed to support an inverse condemnation proceeding. *Supra,* pp. 11-13.

If the nation's air transport needs are to be served through safe and efficient airports, a Federal-State partnership is essential. The Federal Government must provide financial assistance to local communities and devise safe operating procedures. States (and local communities) must use police power to adopt appropriate zoning regulations to protect approaches to the airport for the safety and well-being of both the traveling public and airport neighbors. *Supra,* pp. 3-8, 19, 21-24.

The Federal involvement in airport development and the promotion of safety is immense, both in terms of dollars and regulation. Earlier this year, Congress amended the Federal Airport Act to require the Administrator, as a condition precedent to Federal assistance under the Airport Act, to receive written assurances from airport sponsors that appropriate zoning will be undertaken to restrict the use of land in the immediate vicinity of airports to activities and purposes compatible with normal operations, which include landings and take-offs. The legislative history of this amendment makes it clear that Congress regards airport zoning as substantially related to public safety and general welfare. *Supra,* pp. 19-24.

"Substantial relation" of airport zoning to public safety and general welfare is further attested by

accident investigation statistics provided by CAB which reveal that year after year more than two-thirds of all aircraft accidents occur on or within 5 miles of airports—by the notoriety that led President Truman to create the Doolittle Commission to look into the matter—and by the so-called Doolittle Report which emphasizes that the possibility of crashing is greatest in the approach zone and that tall structures create "a hazard to navigation dangerous both to people in the airplane and on the ground". *Supra*, pp. 24-26.

The Indiana Court's a priori nullification of a zoning ordinance based on the FAA model thus: goes off the course charted in *Euclid;* tends to obscure the meaning of *Causby* and *Griggs;* and paralyzes efforts in Indiana to cooperate with the Federal Government in making airports safer for the traveling public and airport communities safer places in which to live and work. If the decision is upheld and followed in other states, approaches to the nation's airports, unlike the nation's harbors, will be placed beyond the reach of governmental regulation. See *Greenleaf-Johnson Lumber Co., supra.*

Respectfully submitted,

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SUPREME COURT, U. S.

No. 60

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NICK JANKOVICH and PAUL JANKOVICH, Co-Partners, Doing Business as CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, Co-Partners, Doing Business as CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. The Supreme Court of Indiana held that the application to respondent's property, situated in an industrial area, of an airport zoning ordinance prohibiting the erection of structures in excess of 18 feet in height would constitute a taking for which compensation is required by the Indiana constitution and the federal constitution. The question presented is whether

this holding rests on an independent and adequate state ground.

2. If the first question is answered in the negative, then the question presented is whether the application of the airport zoning ordinance to respondent's property would constitute a taking of the property for which compensation is required by the due process clause of the fourteenth amendment to the federal constitution.

STATEMENT

This case was instituted in a state court in Indiana by petitioners who are lessees of portions of an airport owned by the City of Gary, Indiana. (R. 1, 4). The complaint sought relief for injury alleged to arise by reason of respondent's construction on its own property of a toll road. Petitioners asserted that the road extended into the air space to a height prohibited by a zoning ordinance adopted by the City of Gary. The complaint asked for both injunctive relief and for damages for alleged loss of future profits. (R. 8-10). To understand the issues involved in the litigation and on this appeal a statement of certain background facts is necessary.

After the end of World War II the City of Gary, Indiana, decided to build a new municipal airport. A Master Plan was adopted, and a "first phase" construction project undertaken. (R. 78). Federal financial assistance was made available and the project was begun in 1949. (R. 31). In that year, the city adopted an ordinance designed to regulate the height of structures on land in the vicinity of the airport. The city purported to promulgate this ordinance pursuant to

an enabling act adopted by the Indiana legislature in 1945. (R. 152).[1]

The ordinance divided the area surrounding the airport into zones. The "Inner Area Approach Zone" extended 6,000 feet from the end of the runways proposed by the Master Plan.[2] The ordinance prohibited the erection of structures in this zone that would intrude into the air corridor established by a 40 to 1 glide angle measured from the end of the proposed runways. (R. 154).[3] In the case of the proposed north-south runway, which was designed eventually to extend to within 443 feet of the airport's south boundary, application of the ordinance would prevent the erection of structures more than 18.08 feet in height on land that bordered on the airport's south boundary. (Pet. Br. 7).[4]

---

[1] 5 Burns' Ind. Stat. § 14-422 (1964 Repl.). One question presented to but not decided by the court below was whether the Gary ordinance, in view of its failure to provide for compensation in the event its application in any particular case constituted a taking, was a valid exercise of the authority granted to local government units by the state's enabling act. (R. 210; Appellant's Brief to the Supreme Court of Indiana, p. 228). The briefs of the parties below have been certified to this Court and are part of the original record lodged with the Clerk.

[2] An "approach zone" is an area in space beyond the limits of an airport runway that extends over the property of adjacent landowners, and through which planes pass in landing or taking off.

[3] A 40 to 1 glide angle means that for every forty feet from the end of a proposed runway one foot is added to the maximum permissible height of structures. For example, on land 80 feet from the end of a proposed runway the maximum permissible height for structures would be two feet.

[4] The ordinance provides that glide angles will be measured from an elevation of 590 feet. If respondent's land were at that level the height limit imposed by the ordinance would be approximately 11 feet. Since the elevation of respondent's land is 583 feet, an additional seven feet is added in computing the maximum height of structures permitted by the ordinance.

In 1950 petitioners executed an agreement with the city by which they leased a portion of the airport property in order to conduct a "Fixed Base Operator" business. (R. 162-178). The operator of the airport was and is the Gary Board of Aviation Commissioners; however Nick Jankovich, one of the petitioners, was the airport manager. (R. 204). The agreement authorizes petitioners to perform a number of airport services.

Thereafter respondent, a corporation created in 1951 by the laws of Indiana, proposed to construct a portion of the Indiana Toll Road in the vicinity of the Gary airport. The proposed route of the road caused some concern among city officials for a number of reasons and disputes arose between the city and respondent. One of the points that concerned the city officials was the location of the road in relation to the airport. The disputes were ultimately resolved by a settlement agreement (discussed more fully at pp. 55-56, *infra*) executed in August 1955 by respondent, the City of Gary, and a number of official agencies of the city including the Board of Aviation Commissioners. The agreement approved a modified route for the toll road. As part of the agreement respondent agreed to pay the City of Gary $1,500,000 in compensation for any losses and expenses incurred by the city by reason of the construction and operation of the toll road.[5] In 1955 and 1956 respondent constructed the road along the route approved in the agreement. (R. 50).

The toll road borders the south boundary of the airport property at the point where the road inter-

[5] The settlement agreement was inadvertently omitted from the printed record. It appears in the original record as Defendant's Exhibit D (Tr. 949) and was received in evidence at Tr. 948.

sects the south approach zone of the north-south runway, one of the two runways at the airport. The property in question in this case is the land and air space on and in which the toll road is constructed that is within and beneath the Inner Area Approach Zone of the north-south runway. (R. 209-210). That property was acquired by respondent some time before the road was built. (R. 50). At all times since construction of the highway the south end of the north-south runway has been 1,043 feet from the south boundary of the airport (and the north edge of respondent's property). (Def. Ex. A, R. 93, 186). Extension of the north-south runway in accordance with the Master Plan would bring it within 443 feet of the north edge of respondent's property.[6]

Application of the ordinance would prohibit the erection of structures more than 18.08 feet above the surface of respondent's land. The toll road extends approximately 30 feet above the surface of respondent's land. It exceeds by approximately 12 feet the maximum height limitation imposed by the ordinance. (Pet. Br. 7-8).

A railroad catenary system is located behind and adjacent to respondent's property in the approach zone to the north-south runway.[7] Behind the catenary system and also in the approach zone are obstruction light poles that were erected at petitioners' request to warn night fliers of the existence of the cate-

[6] For purposes of this appeal respondent assumes the correctness of petitioners' statement that there remain 600 unconstructed feet at the south end of the runway according to the Master Plan. (Pet. Br. 4).

[7] A catenary system is a system of overhead electrical transmission cables.

nary system. (R. 111). The highest pole intrudes 46 feet into the approach zone; the catenary system intrudes 37 feet.[8] These obstacles existed prior to the construction of the road. (R. 81-82). Their existence requires a steeper glide slope for ascending and descending planes than does the toll road. The glide angle from the top of the obstruction light poles to the end of the north-south runway is 21.7 to 1; from the top of the catenary system to the end of the runway it is 24.4 to 1. (R. 99). The glide angle from the north edge of the toll road to the end of the runway is 27.4 to 1, after allowing for the height of vehicles using the roadway. (R. 73).

Petitioners commenced this lawsuit by filing a complaint in the state court in Indiana on July 26, 1956. The complaint alleged that the erection of the toll road violated the Gary airport zoning ordinance, that by virtue of the ordinance and their lease petitioners had a property interest in the Inner Area Approach Zone air space into which the toll road intruded, that their business would suffer as a result of the erection of the road since the road would restrict the use of the Gary airport by certain types of planes, and that they were entitled to an injunction against maintenance of the road and to damages for prospective loss of business. (R. 1-10).

After trial, the Porter Circuit Court, Porter County, Indiana, denied petitioners' prayer for injunctive relief but entered a judgment awarding petitioners $164,000 damages for prospective loss of business. (R. 20). The Supreme Court of Indiana reversed, holding that

[8] These figures were computed from Defendant's Exhibit A (R. 186) based on petitioners' assertion that there remain 600 unconstructed feet at the south end of the north-south runway.

the zoning ordinance on which petitioners' claim rested could not be validly applied to respondent's property because the application would amount to a taking without the payment of just compensation in violation of the constitution of Indiana and the Constitution of the United States. (R. 208-217).[9] This Court granted the petition for a writ of certiorari on May 25, 1964. 377 U.S. 942.

SUMMARY OF ARGUMENT

I.

This Court has held that it will not review a state court judgment that rests on independent and adequate state ground, even though the state court also passed on a federal question. Before this Court will exercise its jurisdiction it must appear "affirmatively from the record" that resolution of the federal question was a necessary ground of the state court's decision. *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934); *Honeyman* v. *Hanan,* 300 U.S. 14, 18 (1937). In this case the decision of the Supreme Court

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[9] The Supreme Court of Indiana did not pass upon a number of questions under Indiana law raised by respondent. These questions included: (1) whether the settlement agreement between respondent and the City of Gary, referred to at pages 55-56, *infra,* discharged respondent of any liability to petitioners (Appellant's Br. 229-230, 249), (2) whether the zoning ordinance complied with the Indiana statute authorizing municipalities to adopt airport zoning ordinances (*Id.* at 228-229, 232-238), (3) whether limitations on land use imposed by a municipal zoning ordinance are valid as against an agency of the state possessing the power of eminent domain that subsequently acquires land (*Id.* at 229, 243-244), (4) whether the petitioners' proof of damages was sufficient to support the judgment of the trial court (*Id.* at 230-231, 260-269). If this Court should reverse, these questions will again be before the Supreme Court of Indiana.

of Indiana rests on an independent and adequate state ground. This Court therefore has no jurisdiction to review and should dismiss the writ of certiorari.

A.

The court below squarely held that the application to respondent's property of an 18-foot height limitation contained in the Gary airport zoning ordinance would constitute a taking of property for a public use for which compensation is required by article 1, section 21 of the Indiana constitution as well as by the fourteenth amendment to the federal constitution. In reaching this conclusion the court relied on the provisions of the Indiana constitution, on an Indiana statute providing that landowners have property rights in the air space above their land, on its own prior decisions, on decisions in other states and on decisions of this Court.

The interpretation and application of the Indiana constitution by the court below was not the result of "federal constraint" or of the "compulsion of this Court's opinions," as petitioners assert. As the opinion shows, the court below used the decisions of this Court, as well as those of other states and its own prior decisions, simply as "persuasive authorities" for its independent interpretation of the state constitution. The fact that the court below in applying the state constitution cited and relied upon decisions of this Court as "persuasive authorities" does not establish that the state ground of decision is "inextricably entwined with the federal ground." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940); *City of New York* v. *Central Savings Bank*, 306 U.S. 661 (1939).

B.

There is no merit in petitioners' contention that the decision on the state ground is not adequate because it conflicts with the supremacy clause. The decision does not invade any power reserved to the federal government by the Constitution, nor does it conflict in any way with any federal statute. In effect petitioners are arguing that if Indiana either by constitutional provision or by statute expressly provided that the establishment of airport approach zones should be achieved by the exercise of the power of eminent domain or by some other method that required the payment of compensation to landowners such state action would be invalid under the supremacy clause. No authorities support this extraordinary proposition.

The Federal Airport Act does not support petitioners' argument. That Act does not prohibit the states from paying compensation to landowners whose property is adversely affected by the establishment of airport approach zones, nor does it contemplate that the establishment of such zones will be accomplished solely by zoning and without compensation. In fact the statute recognizes that in some cases compensation will be required. The regulations adopted by the Federal Aviation Agency to implement the Federal Airport Act and the FAA's model airport zoning ordinance promulgated as a guide to local communities recognize that the imposition of height limits like the one involved in this case should be achieved by the payment of compensation and not by zoning.

II.

If the Court does not dispose of this case by dismissing the writ of certiorari it should affirm the decision below, for the Supreme Court of Indiana was correct in holding that application to respondent's property of the Gary airport zoning ordinance would constitute a taking of property without compensation in violation of the fourteenth amendment.

A.

Petitioners (and the *amici curiae*) assume that the court below held all airport zoning regulations invalid and direct their argument principally to the general proposition that airport zoning is an important and desirable method of protecting airport approaches from dangerous obstructions. This general proposition is irrelevant because the court below did not hold that the fourteenth amendment makes all airport zoning regulations invalid. It did not hold that the Gary ordinance was invalid in all circumstances. It decided only that the Gary airport zoning ordinance would make it unlawful to maintain on respondent's property any structure exceeding 18 feet in height and that this would constitute a taking of that property for which compensation must be paid. It did not invalidate the ordinance where its effect would be simply to regulate the use of land without so substantially affecting it as to constitute a taking.

The opinion of the Supreme Court of Indiana plainly shows that the decision is based on the application of the Gary airport zoning ordinance to the property involved in this case—not an abstract consideration of the ordinance unrelated to its application. But

even if it is assumed, contrary to fact, that the Supreme Court of Indiana invalidated the Gary ordinance in its entirety, it does not follow that the court held broadly that airport zoning is a constitutionally impermissible method of providing safe approaches for airports. The correctness of the decision turns on the fact that the application of the ordinance to respondent's property would have prohibited any structure extending more than 18 feet from the ground and that this so far interfered with the normal and reasonable use of the property as to amount to a taking. There is nothing in the decision below prohibiting the City of Gary from enacting an airport zoning ordinance containing height limitations that are not so low as to constitute a taking within the meaning of the fourteenth amendment.

B.

A zoning regulation, like any other exercise of the police power, may so substantially diminish property rights as to be a taking in the constitutional sense. See *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922).

The intrusion into and the use of the air space above land may so far diminish or impair the rights of the landowner as to constitute a taking. *United States* v. *Causby,* 328 U.S. 256 (1946); *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962).

The Gary airport zoning ordinance as applied to respondent's property would make it unlawful to maintain on that property any structure exceeding 18 feet in height. The imposition of this height limi-

tation would constitute a taking for which compensation must be paid because it is a direct deprivation of the right of a landowner to control and to use "the immediate reaches of the enveloping atmosphere." *United States* v. *Causby,* 328 U.S. at 264.

The Federal Aviation Agency's regulations adopted to implement the Federal Airport Act, its model airport zoning ordinance, and the report of the President's Airport Commission all recognize that a height limitation of 18 feet is so substantial an interference with the normal use and enjoyment of the property that it should not be imposed by zoning regulations and without the payment of compensation. Under the regulations local authorities constructing an airport are now required, as a condition to receiving federal aid, to acquire title to property that is situated as respondent's property is in this case. The zoning ordinance here involved, as applied to respondent's property, imposes a height limitation that is lower than those specified in the model airport zoning ordinance promulgated by the FAA.

There is no substance in petitioners' argument that the height limitation imposed by the Gary ordinance is not a taking because it is "strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight." (Pet. Br. 43). Even an exercise of the right of eminent domain must be reasonably related to a proper governmental purpose; otherwise the taking is not for a public use. Petitioners' argument confuses the question whether there has been a taking with the question whether the taking is for a "public use." The latter question is not involved in this case. The question here is whether the imposition of an 18-foot height limitation to re-

spondent's property would be a taking, not whether it would be a taking for a public use. Respondent submits that the imposition of such a height limitation would so substantially interfere with the normal and reasonable use of the property located in a highly industrial area as to constitute a taking for which compensation must be paid even if it is assumed that the taking would be for a public use. On the question whether there would be taking the decisions of this Court in *Causby* and *Griggs* and the actions of the federal aviation authorities described above show that the Gary ordinance as applied to respondent's land transcends constitutional limitations.

The theory of petitioners' claim for damages necessarily assumes that the Gary ordinance effected a taking of rights in property adjacent to the airport. Petitioners based their claim for damages on the ground that they have property rights in the airport approach zone that respondent has invaded. In the court below petitioners asserted that "the zoning provisions constituted easements appropriated by the City which became a part of our leasehold." Petitioners' theory is fatal to their argument that there would not be a taking if the ordinance should be applied to respondent's property. If, as petitioners assert, they own an "easement" in the air space above respondent's land, which the city acquired by reason of the zoning ordinance, and which was conveyed to petitioners as part of the lease agreement, it necessarily follows that the easement was appropriated from the owner of the land. That appropriation plainly constituted a taking for which no compensation was paid.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF INDIANA RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND

The rule that the Supreme Court will not review a state court judgment that rests on an adequate and independent state ground, even though a federal question is raised in the case, is a venerable principle of constitutional law. This Court made clear only last Term that its "policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision" follows necessarily from its "constitutional inability to render advisory opinions." *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964).

Before this Court will exercise its jurisdiction it must appear "affirmatively from the record" that resolution of the federal question was a necessary ground of the state court's decision. *Honeyman* v. *Hanan*, 300 U.S. 14, 18 (1937); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934), and cases there cited. This rule precludes review where a state court rests its decision on both a state ground and a federal ground. As the Court said in the *Lynch* case (*Id.* at 54-55):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In the *Lynch* case the Court dismissed the writ of certiorari as improvidently granted because it was unclear whether the decision of the Court of Appeals of New York rested on the federal ground or on an inde-

pendent state basis, saying that the jurisdiction of this Court could not be founded on "surmise."

Application to the present case of the principles on which these cases rest requires dismissal of the writ of certiorari. It does not appear "affirmatively from the record" that resolution of the federal question was necessary to the decision of the Supreme Court of Indiana. On the contrary, the opinion of that court affirmatively demonstrates that its decision rests on an independent state ground sufficient to sustain the judgment. It follows that this Court should decline jurisdiction without regard to whether the court below also purported to decide a question of federal law.

A. The Opinion of the Supreme Court of Indiana Shows That Its Judgment Rests on an Independent State Ground.

The question considered by the Supreme Court of Indiana was whether the application to respondent's property of an airport zoning ordinance that prescribed the maximum height of structures on nearby land would "effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States." (R. 210).

The court began its discussion of this question with a citation of article 1, section 21 of the Indiana Constitution,[10] the fourteenth amendment to the United

[10] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

States Constitution, a decision of this Court [11] and one of its own earlier decisions.[12] (R. 211). The cases cited by the court stand for the familiar rule, applicable in Indiana as elsewhere, that regulations enacted ostensibly in furtherance of the police power can so substantially affect certain property rights as to constitute a taking of those rights for which just compensation must be paid.

The court then posed two issues: (1) whether a landowner has constitutionally protected property rights in the air space above his land; and if so, (2) whether the property rights in the air space involved in this case were taken without compensation. (R. 211).

The court commenced its consideration of the first issue by citing an Indiana statute declaring that landowners own the air space above their land.[13] The court went on to note that a landowner's property interest in the air space above his land has also been recognized in judicial decisions, citing a decision of the Supreme Court of Indiana,[14] two decisions of this Court,[15] and a decision of the Supreme Court of Washington.[16] (R. 211-12).

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[11] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[12] General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). This decision held that a zoning ordinance could not be used to compel the removal of billboards without the payment of compensation.

[13] 5 Burns' Ind. Stat. § 14-103 (1956 Repl.).

[14] Capitol Airways v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. 2d 776 (1938).

[15] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962).

[16] Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960).

Petitioners argue that the decision below was reached "by force of this Court's decisions, and the federal constraint exerted by them." (Pet. Br. 52). The opinion of the Court below belies this claim. In deciding that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (R. 213) the court relied primarily upon the Indiana statute. The court did not suggest that in interpreting the state statute it was bound by the decisions of this Court. The two decisions of this Court as well as its own prior decision and the decision of the Supreme Court of Washington were treated simply as persuasive authorities with respect to the interpretation and application of that statute in the present case. Had the court below been indulging in "necessary obedience" to this Court's views, as petitioners assert, it would have been unnecessary for it to cite the Indiana statute, and pointless to cite its own prior decision or the decision of the Supreme Court of Washington. In short both the language and the reasoning of the court below negate petitioners' contention that the premises of its decision "are derived from the compulsion of this Court's opinions." (Pet. Br. 52).

The court's analysis of the second of the two issues, *i.e.*, whether the application of the ordinance to respondent's property would be a taking without compensation, also negates the assertion that the decision was reached because of "necessary obedience to this Court's views." (*Ibid.*) The court drew a distinction "between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of police power, and the taking of property for public use, for which compensation must be paid."

(R. 214). As precedent for this distinction the court cited two of its earlier decisions,[17] three decisions of this Court [18] and a treatise on the law of zoning.[19] It cannot seriously be contended that in acknowledging this distinction the court below was controlled by the "compulsion of this Court's opinions." The distinction is a familiar and elementary one; it has long been embodied in the laws of the several states and it had been recognized and applied by the Supreme Court of Indiana as a principle of Indiana law in *General Outdoor Advertising Co.* v. *City of Indianapolis,* 202 Ind. 85, 172 N.E. 309 (1930) and *Goldsmith* v. *City of Indianapolis,* 208 Ind. 465, 196 N.E. 525 (1935)—decisions that antedated *United States* v. *Causby,* 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962), on which petitioners claim the court below placed "prominent reliance."

The court applied this distinction to the facts before it, holding that the application of the ordinance to respondent's property would appropriate for public use without compensation the ordinarily useable air space of that property. In reaching this conclusion the Supreme Court of Indiana did not cite or rely upon any decisions of this Court but instead treated

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[17] Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Goldsmith v. City of Indianapolis, 208 Ind. 465, 196 N.E. 525 (1935).

[18] Gorieb v. Fox, 274 U.S. 603 (1927); Pennsylvania Coal Co. v. Mahon, *supra,* Griggs v. Allegheny County, *supra.*

[19] 1 Metzenbaum, Zoning 70-76 (2d ed. 1955).

the question as one that turned upon the particular facts involved.[20]

In summary, nothing in the opinion of the Supreme Court of Indiana suggests that the decision does not rest on an independent interpretation of Indiana law. The citation of the relevant state constitutional provision, and the reliance on a controlling state statute affirming a landowner's propery interest in air space above his land and Indiana judicial decisions dealing with rights in air space and the distinction between regulation and the taking of property, show that the court below was interpreting and applying the law of Indiana. There is a complete lack of any support for the proposition that the decision was reached only by the "compulsion of this Court's opinions."

Even if the opinion of the court below is read as deriving from this Court's opinions some support for its decision under Indiana law there would be no basis for the exercise of this Court's jurisdiction. This Court has held that if "the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution . . . we would have no jurisdiction to review." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940); *City of New York* v. *Central*

[20] The relevant passage in the opinion of the court below is found in the third full paragraph on page 214 of the Record. Earlier in its opinion the court had set forth the facts relating to the effect of the ordinance upon respondent's use of its land. (R. 209-210).

Savings Bank, 306 U.S. 661 (1939).[21] Had there been no federal question raised and had the court below written an opinion precisely like the one actually written but directed only to the state constitutional question it could not be seriously argued that this Court had jurisdiction to review the decision merely because the court cited opinions of this Court and relied upon their reasoning. A different conclusion is not warranted in this case because a federal question was raised.

Petitioners contend that the state ground of decision in this case is "inextricably entwined with the federal ground" and that therefore the judgment of the court below does not rest upon an independent interpretation of state law. They attempt to support their argu-

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[21] In City of New York v. Central Savings Bank, the Court of Appeals of New York held a municipal dwelling law unconstitutional and had amended its remittitur to make clear that its decision rested on both the state and federal constitutions. In its order amending the remittitur that court explained (280 N.Y. 9, 10, 19 N.E. 2d 659 (1939)) that

> "We gave to the decisions of the Supreme Court of the United States, defining the due process clause, the great weight which, in our opinion, they should have by reason of the prestige of the court and the strength of the reasoning even if technically we might have power to reject them in defining the same clause in the State Constitution. Our conclusion that the statute is repugnant to article 1, section 6, of the State Constitution followed necessarily from our determination that in accordance with a long line of decisions of the Supreme Court of the United States, the statute is repugnant to the Federal Constitution."

Despite the plain statement of the Court of Appeals that it had relied on federal decisions in construing the state constitution this Court denied a petition for a writ of certiorari "for the reason that the judgment sought to be reviewed rests upon a nonfederal ground adequate to support it." 306 U.S. 661.

ment by quoting language of this Court in other cases which lays down the general rule that *if* a nonfederal ground is so interwoven with a federal ground that it is impossible to conclude that the judgment rests on an independent interpretation of state law this Court may exercise its appellate jurisdiction. This general principle is not in dispute. But nothing in the cases cited by petitioners suggests that the state ground on which the Indiana court rested its decision is "inextricably entwined" with the federal ground.

In *State Tax Commission* v. *Van Cott*, 306 U.S. 511 (1939), on which petitioners place principal reliance, the Supreme Court of Utah held that the meaning of a state taxing statute depended on the extent of the state's power under the federal constitution to levy the taxes in question, and that it was bound by the decisions of this Court in resolving this question of federal constitutional law.[22] Rejecting a contention that the decision of the Supreme Court of Utah rested on an independent state ground this Court said that the court's opinion "indicates that 'it thought the federal constitution [as construed by this Court] required' it to hold respondent not taxable." On that basis the Court concluded that the interpretations of the state statute and the federal constitution were "so interwoven that we are unable to conclude that the judgment rests on an independent interpretation of the state law." (306 U.S. at 514).

The present case is in no sense analogous to *Van Cott*. There resolution of the question of federal law was necessarily decisive of the meaning of the state

[22] Van Cott v. Tax Commission of Utah, 95 Utah 43, 61, 79 P.2d 6, 14 (1938).

statute. In this case, on the other hand, the Supreme Court of Indiana did not hold that in interpreting and applying the Indiana constitution it was bound or constrained in any way by the decisions of this Court interpreting and applying the federal constitution.[23]

The decisions in *Enterprise Irrigation District* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917), and *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931), are also inapposite. In *Enterprise Irrigation District* both a federal and a nonfederal ground were involved in the decision below. The court found on the particular facts involved that the nonfederal ground (estoppel) was independent of the federal question (alleged lack of notice of hearing) and dismissed the case. In *Abie State Bank* this Court held, again on the basis of the particular facts involved, that the question of estoppel was so interwoven with the federal question under the fourteenth amendment that it was not an independent and adequate nonfederal ground. These cases turned on the particular facts and issues presented in each. The issue in the present case is not even remotely related to the issues there

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[23] Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1, (1950), cited by petitioners, also involved a situation in which the state court believed that its action was controlled by the decisions of this Court. No question of an independent state ground for the decision below was involved because the state court believed it was precluded from applying local law.

Perkins v. Benguet Consolidated Mining Co. 342 U.S. 437 (1952), similarly involved a situation in which this Court felt there was reason to believe that the state court had based its decision solely on a question of federal constitutional law. On remand the Supreme Court of Ohio confirmed this interpretation of its earlier decision. Perkins v. Benguet Consolidated Mining Co., 158 Ohio St. 145, 147, 107 N.E.2d 203, 205 (1952).

Rayonier, Inc. v. United States, 352 U.S. 315 (1957), was a suit in the federal courts under the Federal Tort Claims Act. No question of federal jurisdiction was involved.

involved. Hence the opinions in those cases provide no support for the contention that the holding of the Supreme Court of Indiana with respect to the constitution of Indiana is "inextricably entwined" with its holding as to the federal constitution.

Minnesota v. *National Tea Company,* 309 U.S. 551 (1940), also cited by petitioners, is in fact adverse to their contentions. That case involved a challenge to a state tax as violative of both the state constitution and the equal protection clause of the fourteenth amendment. The state supreme court noted that the two constitutional provisions " 'impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation.' " After briefly adverting to three Minnesota precedents the court discussed in detail decisions of other tribunals, including decisions of this Court. As to the latter decisions it professed " 'that we should follow them and that it is our duty to do so.' " (309 U.S. at 552, 554).

Despite these indications that the state decision may have been compelled by prior interpretations of the federal constitution this Court declined to review, deciding instead to remand for clarification because it could not state with assurance that the decision of the state court rested on an interpretation of the federal constitution. "It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review." *Id.* at 556.[24]

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[24] On remand the Supreme Court of Minnesota declared that its decision rested independently on an interpretation of the state constitution. National Tea Co. v. State, 208 Minn. 607, 608, 294 N.W. 230, 231 (1940).

In the present case, unlike *Minnesota* v. *National Tea Co.*, there was no indication by the Supreme Court of Indiana that it believed itself under a "duty" to follow the decisions of this Court in interpreting its state constitution, or that it regarded the decisions of this Court as anything more than "persuasive authorities."

B. The Independent State Ground of Decision Is Not Invalid Under the Supremacy Clause.

Petitioners contend that even if there is an independent state ground for the decision below it is not "adequate" to sustain a judgment because it is in conflict with the supremacy clause of the federal constitution.

This argument has no merit. There is no federal statute that prohibits the states from paying compensation to property owners whose rights are diminished by the establishment of airport approach zones irrespective of whether the diminution of rights amounts to a taking in the constitutional sense. There is no federal statute that requires or even contemplates that aerial approach zones must always be established by zoning ordinances and never can be established by the payment of compensation. In effect petitioners are arguing that if Indiana either by constitutional provision or by statute expressly provided that the establishment of airport approach zones should be achieved by the exercise of the power of eminent domain or by some other method that required the payment of compensation to landowners such state action would be invalid under the supremacy clause. No authorities even remotely support this extraordinary proposition.

The Federal Airport Act,[25] on which petitioners exclusively rely to support their argument under the supremacy clause, imposes no restrictions upon the states or their political subdivisions in relation to the establishment of airports or the regulation of the rights of landowners adjacent to airports. The act requires the Administrator of the Federal Aviation Agency to prepare and revise annually a National Airport Plan and authorizes the grant of federal funds, under conditions imposed by the Administrator, to assist in the construction of airports included within the National Airport Plan. But the Act is permissive only. No public agency is required to accept federal aid or the conditions imposed by the federal government. In fact, the Federal Airport Act specifically states that it does not authorize a public agency to seek federal aid where the agency is prohibited by the law of such state from doing so.[26]

The refusal of Congress to assert its power to restrict the freedom of action of the states or their local units in the field of airport construction, even though the airports be part of the National Airport Plan, is not the consequence of Congressional unawareness of the problems relating to the establishment of airports, including aerial approach zones. Proposals for federal regulation of land use in the vicinity of airports

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[25] 60 Stat. 170-180 (1946), 49 U.S.C. §§ 1101-1119 (1958).

[26] Federal Airport Act § 9(b), 49 U.S.C. § 1108(b).
The limited reach of federal authority in this field was dramatically illustrated several weeks ago when the Port of New York Authority rejected federal aid on a project to improve the LaGuardia Airport in New York City rather than accept the conditions sought to be imposed by the federal government. Wall Street Journal, August 7, 1964, p. 3, col. 3.

in the states have been made to Congress.[27] At one time the House Interstate and Foreign Commerce Committee recommended adoption of such a law.[28] But Congress declined to follow the recommendation. It has been unwilling to intrude on the traditional state function of regulating land use in the vicinity of airports, and has left to the states full freedom to apply their own concepts of land use regulation. Even assuming that the exercise of a delegated power by Congress could have the consequence of restricting a state's power to require compensation for an interference with property rights, a matter of considerable doubt, the deliberate Congressional decision not to exercise this power eliminates any possible application of the supremacy clause in this case.

To support their argument on the supremacy clause, petitioners do not rely upon any specific provisions of the federal constitution or upon any assertion or exercise of federal regulatory power. Instead, they seek to derive from the purely permissive provisions of the Federal Airport Act a vague concept, sometimes described as "federal aviation policy" and sometimes as the "federal scheme," which they contend is inconsistent with the decision below. In their brief petitioners summarize their argument on this point in two conclusory assertions: (1) "The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed

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[27] See S. 246, H.R. 1012, 3420, 3491, 78th Cong., 1st Sess. (1943); S. 3129, 82nd Cong., 2d Sess. (1952).

[28] H. Rep. No. 124, 784, 78th Cong., 1st Sess. (1943).

aerial approaches" and (2) "the total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme." (Pet. Br. 53-54).

Neither of these assertions is valid. There is no "federal scheme" or "policy" of the kind asserted by petitioners. No federal statute requires or even contemplates that airport approach zones over adjacent land must be established exclusively by airport zoning and without the payment in appropriate circumstances of just compensation. On the contrary, the federal scheme contemplates and in fact encourages the purchase of such land or of interests in the air space above the land. Section 13 of the Federal Airport Act (49 U.S.C. § 1112) lists "costs of acquiring land or interests therein *or easements through or other interests in air space*" (emphasis supplied) among those costs for which federal funds may be used. This is a legislative recognition that in some cases the establishment of approach zones will require compensation for property rights.[29]

The Administrator of the Federal Aviation Agency has adopted regulations to implement the statute. These regulations require, as a condition to federal aid for new airports or for development of new runways at existing airports, *the acquisition of an "adequate property interest in runway clear zone areas"* (emphasis supplied). Under the regulations the "run-

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[29] Section 13 of the Federal Airport Act was described in Griggs v. Allegheny County, 369 U.S. at 93 (dissenting opinion), as authorizing reimbursement for the acquisition of easements "necessary for the clearing and protecting of 'aerial approaches' from physical 'airport hazards.'"

way clear zone area" is measured by reference to the approach zone established by the applicable FAA standards and its length is the distance required for the applicable approach zone to reach a height of 50 feet above the terrain (or 50 feet above the elevation at the end of the runway if that would result in a shorter length). (14 CFR §§ 151.9, 151.11 (Supp. 1964)). It is important to note that respondent's property lies well within the limits of the runway clear zone for the north-south runway of the Gary airport. The lower limit of the approach zone above respondent's land is only 18 feet. Hence, Gary, if it were constructing its airport today, could not qualify for federal aid without acquiring respondent's property.

It is also significant that when the Federal Aviation Agency prepared and promulgated a model airport zoning ordinance for use by the political subdivisions of the several states it recognized that no attempt should be made by zoning to impose a height limitation like the 18-foot limitation here involved on property adjacent to an airport, but that instead rights in such property should be acquired by a taking and the payment of compensation. See pp. 40-41, *infra*.

There is, therefore, no "federal aviation policy" or "federal scheme" which requires or even assumes that a height limitation of the kind imposed by the Gary ordinance should or may be imposed by zoning regulation. On the contrary, the "federal policy" contemplates, and indeed requires as a condition to federal aid, that there be a taking of and the payment of compensation for any land that is situated beneath

an airport approach zone and immediately adjacent to an airport runway.[30]

Petitioners' second assertion—that the decision below involves a "total nullification of airport zoning"—is also without substance. The Supreme Court of Indiana did not hold that all airport zoning ordinances were invalid under the Indiana Constitution; it did not hold that the Gary ordinance was invalid in all circumstances and as applied to all property.[31] As we

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[30] Petitioners cite the 1964 amendment to the Federal Airport Act, which requires that the Administrator of the Federal Aviation Agency receive, as a condition precedent to the approval of federal aid, written assurance that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable, to restrict the use of land" in the vicinity of the airport to uses compatible with normal airport operations. They quote from a statement made by the Administrator in support of this amendment. (Pet. Br. 55). The very statement cited shows that the Administrator did not regard the 1964 amendment as contemplating the use of zoning regulations in every case to establish airport approach zones. S. Rep. No. 446, 88th Cong., 1st Sess. 21 (1963) (excerpt from letter of FAA Administrator Halaby). And the fact that the statute speaks of "appropriate action, *including* the adoption of zoning laws" belies the suggestion that Congress believed that zoning regulations were to be the sole method of establishing airport approach zones.

Petitioners refer to the FAA Standard Application Form for federal aid for airport projects. The form does not advance petitioners' argument. It simply requires the project sponsor to prevent obstructions to the airport in accordance with standards established by the FAA *"either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace"* or by zoning. (Pet. Br. 28). As we have seen, the FAA standards would require the acquisition of respondent's land as a condition to federal aid.

[31] Even if the opinion of the Supreme Court of Indiana is read as having invalidated the existing Gary airport zoning ordinance in its entirety, there is nothing in the opinion to suggest that Gary cannot adopt a new ordinance that contains reasonable height limits as, for example, height limits of the kind recommended in the FAA model ordinance. See pp. 40-41, *infra*.

shall show at pages 32-35, *infra*, the Supreme Court of Indiana held only that the ordinance was invalid as applied to respondent's property. But even if the Supreme Court of Indiana had held that, under the state constitution, all zoning ordinances imposing height limitations on land immediately adjacent to an airport are invalid unless there is a provision for compensation no supremacy clause problem would be presented. There is no obligation imposed on the states by the federal government to construct airports or to establish unobstructed approach zones. Surely if the states are not obligated to establish approach zones at all, they are not prohibited, if they elect to establish such zones, from paying compensation to affected property owners.

The decision of the court below interpreting and applying the constitution of Indiana was both an independent and an adequate ground of decision. It follows that this Court should decline to exercise its jurisdiction.

II. THE COURT BELOW DID NOT ERR IN HOLDING THAT AN AIRPORT ZONING ORDINANCE PROHIBITING THE ERECTION OF STRUCTURES IN EXCESS OF EIGHTEEN FEET IN HEIGHT ON PROPERTY SITUATED IN AN INDUSTRIAL AREA CONSTITUTES A TAKING OF PROPERTY FOR WHICH COMPENSATION IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

So far our argument has been directed to the question whether this Court should decline to exercise its appellate jurisdiction because the judgment of the Supreme Court of Indiana rests on an independent and adequate state ground. If the case is not disposed of on that basis this Court will be required to decide whether as a matter of federal constitutional law the zoning ordinance here involved is invalid as applied to respondent's property.

Petitioners (and the *amici curiae*) approach this question on the assumption that the court below held all airport zoning regulations invalid and they direct their argument principally to the general proposition that airport zoning is an important and desirable method of protecting airport approaches from dangerous obstructions. This general proposition is irrelevant because the court below did not hold that the fourteenth amendment makes all airport zoning regulations invalid. It did not hold that the Gary ordinance was invalid in all circumstances. The lower court decided only that the Gary airport zoning ordinance as applied to respondent's property would make it unlawful to maintain any structure exceeding 18 feet in height and that this would constitute a taking of the property for which compensation must be paid. It did not invalidate the ordinance where its effect would be simply to regulate the use of land without so substantially affecting it as to constitute a taking.[32] The failure of petitioners and the *amici* to comprehend this distinction in the opinion of the court renders much of their argument extraneous to the real issue in this case, which is whether the Gary airport zoning ordinance, if applied to the property involved in this case, would effect a taking of that property.

The question of the scope of the decision below is of substantial importance in relation to the constitutional issue that petitioners seek to raise before this

[32] The maximum permissible height of structures in the area covered by the Gary ordinance is 150 feet (R. 154). Application of a 150-foot limitation on the height of structures raises a different question than does the application of an 18-foot limitation.

Court.[33] For that reason we propose to discuss that point before turning to the constitutional question.

A. The Court Below Did Not Hold Broadly That All Zoning Regulations Are Invalid or That The Gary Airport Zoning Ordinance Was Invalid in Its Entirety.

At every step of the way the opinion of the Supreme Court of Indiana makes clear that the decision is based on the application of the Gary airport zoning ordinance to the property involved in this case—not on an abstract consideration of the ordinance unrelated to its application. At the outset, the court stated that the question before it was whether the ordinance was unconstitutional "in that it purported to appropriate, without compensation, the reasonable and ordinary use of property *on which appellant constructed its toll road.*" (R. 210; emphasis supplied). This statement of the issue indicates as clearly as words permit that the court was considering the constitutionality of the ordinance as applied to the property involved in this case.[34]

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[33] Even if it is assumed, contrary to what we believe to be the case, that the court below held the Gary ordinance invalid in a general and abstract sense, we do not suggest that this Court should consider the federal constitutional question in such general and abstract terms. If the Court decides to exercise its appellate jurisdiction, the question presented is whether the ordinance is invalid as applied to the particular property here involved. It would be unnecessary for this Court to consider the validity of the ordinance as it might be applied to other property or in other circumstances.

[34] In Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. at 87-88, 117 N.E. 2d at 118, one of the cases cited by the Supreme Court of Indiana, it had recognized that a zoning ordinance might be "valid generally but invalid as applied to certain property."

The court set forth two issues the resolution of which was necessary to its decision: (1) whether property rights can exist in air space above land, and (2) "whether *in the instant case* there has been a constitutionally proscribed taking." (R. 211; emphasis supplied). Again the language chosen reflects the view that application of the ordinance to the property in this case would determine the outcome of the suit.

The first issue was resolved by holding that the "reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation," (R. 213) a proposition that cannot be disputed.[35]

The second issue was restated to be "whether an unconstitutional taking has resulted *in the instant case*" (R. 214; emphasis supplied); again, a limitation

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[35] Respondent desires to correct a mistaken impression that may be conveyed by petitioners' misleading quotation from the opinion of the Supreme Court of Indiana. Petitioners quote the court as saying: "Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport." (Pet. Br. 50). Petitioners' use of this excerpt distorts the court's meaning. The language does not refer to respondent's use of its land or to the Gary airport. It comes from another decision, and was quoted by the court solely to demonstrate that landowners have property rights in superadjacent air space. The case in which the language appears (Capitol Airways v. Indianapolis Power & Light Co., *supra*) held that the adjacent landowner could "erect flagpoles," etc., notwithstanding the effect on the nearby privately-owned airport *because* there was no zoning ordinance on the books that prohibited such uses of land by the adjoining landowners.

of the decision to the application of the ordinance to respondent's property. By way of preface to the second issue the court drew the familiar distinction between regulation that restricts the enjoyment and use of property and a taking of property for which compensation is required. As an example of valid regulation the court referred to building set-back rules common to comprehensive zoning laws, thereby demonstrating an appreciation of the role of the zoning power in land use regulation.

After explaining the distinction between regulation and taking, the court decided that the ordinance in question attempted to take *"the ordinarily usable air space of property adjacent* to the Gary Airport without the payment of compensation." (R. 214; emphasis supplied). The repeated references to the property "in the instant case" require the conclusion that the "property adjacent to the Gary Airport" referred to by the Court was respondent's property, which was located immediately adjacent to the airport property. Moreover, the court did not say that the ordinance was unconstitutional as applied to all air space in the vicinity of the Gary airport, but only the air space that is "ordinarily usable."

The court concluded its opinion by repeating that the ordinance was "wholly void *insofar as it purported to authorize the taking of private property without compensation therefor."* (R. 217; emphasis supplied). It did *not* hold the ordinance void insofar as it did *not* purport to take private property without com-

pensation, nor did it hold that the ordinance effected a taking wherever it applied.[36]

That the court did not strike down the airport zoning ordinance in its entirety, if not made sufficiently clear by the limiting language of the court's opinion, is made so by section 12 of the ordinance itself, which provides that if the application of the ordinance to any person is held invalid, such invalidity shall not affect other applications of the ordinance.[37] Certainly the court would not have ignored this provision had it meant to hold, on the basis of the invalid application shown in this case, that the entire ordinance was null and void as to all applications.

Finally, even if it is assumed, contrary to fact, that the Supreme Court of Indiana invalidated the Gary airport zoning ordinance in its entirety, it does not follow, as petitioners assert, that the court held broadly that airport zoning is a constitutionally impermissible

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[36] In their brief, petitioners refer to another passage in the opinion of the court below in which it spoke of the ordinance as "invalid as an entirety." (Pet. Br. 20). An examination of the passage in which these words occur shows that the court was not holding the ordinance void or invalid as applied in other circumstances to other property. The reference to the statute being "void in its entirety" was made in discussing whether respondent was required to apply for a variance in accordance with the provisions of the ordinance. The court held that the provisions of the ordinance relating to applications for a variance, as well as its other provisions, were invalid as applied to respondent. (R. 214).

[37] Section 12 of the ordinance states: "If any of the provisions of the ordinance or the application thereof to any person or circumstances [is] held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable." (R. 157).

method of providing safe approaches for airports. As we shall show at pages 37-48, *infra*, the correctness of the decision below turns on the fact that application of the Gary ordinance to respondent's property would have prohibited any structure extending more than 18 feet from the ground and that this so far interfered with the normal and reasonable use of the property as to amount to a taking. Under the decision of the court below the City of Gary is free to enact an airport zoning ordinance containing height limits that are not so low as to constitute a taking of property within the meaning of the fourteenth amendment. It might, for example, promulgate an ordinance like the model zoning ordinance prepared by the Federal Aviation Agency, which is set forth in the appendix to petitioners' brief and which contains height limits that do not raise the constitutional problems posed by the Gary ordinance. See pages 40-41, *infra*. There is, therefore, no basis for petitioners' assumption that the decision below laid down a general rule that the police power cannot be exercised to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access or that "the governmental means to serve this end are restricted to purchase or condemnation." (Pet. Br. 20).

B. The Court Below Was Correct in Holding That the Ordinance as Applied to Respondent's Property Would Constitute a Taking for Which Compensation Must Be Paid.

1. The Imposition of a Height Limitation Prohibiting Structures More Than Eighteen Feet From the Ground Would Be Such a Substantial Diminution of Respondent's Property Rights as to Constitute a Taking.

A zoning regulation, like any other exercise of the police power, may so substantially diminish property rights as to be a taking in the constitutional sense. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594

(1962); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Delaware, L. & W. R.R.* v. *Town of Morristown*, 276 U.S. 182, 193 (1928); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 415-16 (1922).

This Court has recognized that the intrusion into and the use of the air space above land may so far diminish or impair the rights of the landowner as to constitute a taking. See *United States* v. *Causby*, 328 U.S. 256 (1946) and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Causby* this Court declared that if, "by reason of the frequency and altitude" of flights, landowners could not use their land for any purpose, their loss would be "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it;" "in those circumstances there would be a taking. . . . The fact that the planes never touched the surface would be . . . irrelevant. . . . The owner's right to possess and exploit the land—that is to say his beneficial ownership of it—would be destroyed." (328 U.S. at 261-262).

This Court observed that the principle applies also if the enjoyment and use of land is only partially destroyed. "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the air space immediately above the land would limit the utility of the land and cause a diminution in its value." In such a case, said the Court, there would be a partial taking. "The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his ex-

ploitation of it." (328 U.S. at 262, 265). The *Griggs* case rests on similar premises.

The fact that *Causby* and *Griggs* involved trespass into air space and not the validity of airport zoning regulations does not, as petitioners assert, make those cases inapplicable. (Pet. Br. 48-50). In each case the issue was whether there had been a taking in the constitutional sense by reason of governmental action; in the *Causby* case by the federal government, in the *Griggs* case by a subdivision of the state. In each case this Court held that such a taking had occurred. Petitioners never explain why the test of what constitutes a taking should vary depending upon whether the taking is accomplished by trespass or by regulation. In either case the question is whether governmental action has interfered or would interfere so substantially with the landowner's normal and reasonable use of his property as to require the payment of compensation.[38]

In *Causby* and *Griggs* the Court held that the intrusion of planes into the *air space* above the land substantially diminished the use and enjoyment of the *land,* even though there was no trespass on the land

[38] The brief *amicus curiae* of the National Institute of Municipal Law Officers argues that the application of an airport zoning ordinance can never amount to a taking because a property owner suffers a taking "only when the government has transferred unto itself whatever private rights in airspace are actually recognized by the Courts." (NIMLO Br. 12). The argument is contrary to this Court's holding in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and to the principles stated in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). The other *amici* briefs concede that the application of an airport zoning ordinance may constitute a taking in particular cases. Indeed, the Air Transport Association acknowledges that the Gary ordinance might constitute a taking if applied to the land involved in this case. (ATA Br. 15).

itself. Here the ordinance, if applicable, would have substantially diminished the use and enjoyment of respondent's land by imposing a drastic limitation on the height of the structures that could be placed on the land. And concededly in this case there will be intrusion by aircraft into the air space above respondent's land; indeed, petitioners' entire case rests on the assumption that they are entitled to damages because the intrusion into the air space by certain types of aircraft will be curtailed or diminished by reason of the height of the highway. Indeed the interference with respondent's use and enjoyment of its property is at least as direct as the type of interference that follows from the intrusion of aircraft into the air space above land. The instant case involves not simply flights over the land but a direct prohibition against erection on the land of structures more than eighteen feet in height.

Petitioners also attempt to distinguish *Causby* and *Griggs* on the ground that those cases protect land use by requiring compensation where flights impair such use whereas "airport zoning still allows ample land use below the defined height limits." (Pet. Br. 49).[39] But the airport zoning ordinances in this case do not allow "ample land use below the defined height limits." A limitation that makes it unlawful for a landowner to maintain on his property any structure

[39] As part of the same argument petitioners attempt to distinguish Causby and Griggs on the ground that those cases deal with the "downward reach of aircraft," not the "upward reach of structures." The infirmity of this argument is that the height limitation imposed on respondent's property reached downward so far that, if enforced, it would have resulted in the very sort of limitations on land use that were found to have resulted from the low flying aircraft in Griggs and Causby.

exceeding 18 feet in height is so drastic and substantial an interference with the normal use and enjoyment of property as to constitute a taking under the test laid down in *Causby* and *Griggs*. As this Court said in *Causby* (328 U.S. at 264): "Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted. . . ." It could hardly be disputed that a height limitation of 18 feet is a substantial interference with the right of a landowner to control "the immediate reaches of the enveloping atmosphere;" such a limitation would apply to most houses and to many trees.

The federal authorities, who are responsible for what petitioners describe as "federal aviation policy," have recognized that the imposition of a height limitation of 18 feet on land adjacent to an airport is so substantial an interference with the normal use and enjoyment of the property as to raise serious constitutional problems unless it is achieved by the payment of compensation. This recognition is significant, not so much because of its deference to familiar constitutional principles, but rather because it represents the informed judgment of persons experienced in the field with respect to the kinds of height limitations that might as a question of fact be regarded as substantially diminishing property rights.

In July 1960 the FAA prepared and promulgated a model airport zoning ordinance "for use as a guide by the political subdivisions of those states which have enacted airport zoning enabling acts." (Pet. Br. App. 27a-30a). That model ordinance established height

limitations governing structures on land located in airport approach zones but specifically provided:

> "Nothing in this Ordinance shall be construed as prohibiting the growth, construction or maintenance of any tree or structure to a height up to 45 feet above the surface of the land." (Pet. Br. App. 38a).

The FAA explained this provision in the Foreword to the model ordinance:

> "The model ordinance also prescribes height limitations for each of the zones established by the ordinance. Any height limitations imposed by an airport zoning ordinance must be 'reasonable' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation. Therefore, the zoning ordinance should not purport to impose height limitations in any area where the approach slope is close to the ground, which is generally the case in the innermost portions of the approach zone. This problem is taken care of in the model ordinance in Section IV, Height Limitations, which provides that the ordinance shall not be construed as prohibiting the growth, construction, or erection of any tree or structure to a height not to exceed 45 feet.
>
> "In cases where the airport is located in an area of undeveloped and relatively barren land the excepted height may possibly be as low as 35 feet. On the other hand if the airport is located in an area that is somewhat built up and where normal use of the land may involve structures 40 to 50 feet in height it would probably be desirable to establish the excepted height limitation at 55 or possibly 60 feet." (Pet. Br. App. 28a-29a).

This is a plain recognition by the FAA that, in normal circumstances, a height limitation preventing the erec-

tion of structures within 45-50 feet of the land's surface would probably be a taking for which compensation is required. In the case of land in an "undeveloped and relatively barren area" the height limit "may possibly be as low as 35 feet" before it becomes a taking. It is sufficient to note that the limitation in the present case, if enforced, would prohibit structures extending more than 18 feet above the surface of respondent's land, and that this land was located in a highly developed industrial area. (R. 110). Thus, the Gary ordinance does not comply with the standards prescribed by the FAA to meet constitutional limitations.

The limits on the zoning power contained in the FAA's 1960 model ordinance are a refinement of the earlier model ordinance prepared in 1947 by the Civil Aeronautics Administration in conjunction with the National Institute of Municipal Law Officers (*amicus curiae* in this case). The 1947 model ordinance did not set out specific height limits but it recognized the same constitutional limitations that were discussed in the Foreword to the 1960 model ordinance. Petitioners suggest that the Gary ordinance, adopted in 1949, was "tailored from" the 1947 model. (Pet. Br. 36, App. 49a-60a). However, like petitioners here, the City of Gary failed to take account of the constitutional limitations recognized in the Foreword to the 1947 model ordinance:

> "Such aeronautical considerations, however, are not the only ones that should be taken into account in determining what the regulations should be. It is hardly necessary to point out that any airport zoning regulation must, as is stated in Section 6(1) of the model act, be 'reasonable' meaning that the height limits prescribed may not be so low that they would constitute a taking of prop-

> erty without compensation in violation of the Federal and State Constitutions. Since CAA standards call for unobstructed airspace above 30 or 40 to 1 flight path beginning at the end of the runway at ground level, it is apparent that a height limit as low as that necessary cannot be imposed by the airport zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of the property in the neighborhood. Consequently, it should be decided locally, after the necessary airport approach flight paths have been determined, the distance from the airport within which the height of structures may not be so limited without being confiscatory, and from this point to the airport boundary aviation easements or title should be acquired as provided in Section 13 of the model act." [40]

In this case respondent's land is located on the boundary of the airport property and less than one-fourth of a mile from the end of the north-south runway. The surrounding area is industrial. Steel mills were located just to the north of the airport. There were gas producing plants to the west and other businesses on the east. Railroads were located contiguous to respondent's property on the south. (R. 109-110).

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[40] Pet. Br. App. 50a. The Model Act referred to is the Model State Airport Zoning Act published in 1944 by the CAA and the NIMLO. Section 13 of this Act provides for the outright acquisition of property rights "in any case in which . . . the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations." (App. (p. 3a).

Excerpts from the Model Act are reproduced in the appendix to this brief, pp. 1a-3a. Most of the states have adopted enabling acts "substantially similar" to the model act published by CAA and NIMLO in 1944. (Pet. Br. 23). Hundreds of local communities have patterned airport zoning ordinances after the FAA or CAA-NIMLO models.

This was not an undeveloped or barren area but rather an area that was being used for industrial purposes. The President of the Board of Aviation Commissioners testified that the area is "highly industrial." (R. 110).

In the passage quoted above the CAA and NIMLO recognized that "a height limit as low as that necessary" to achieve a 40 to 1 flight path "cannot be imposed by the airport zoning method for some distance from the end of the runway." In view of the proximity of respondents' property to the end of the runway, the use made of the property in the neighborhood, and the fact that to attain a 40 to 1 flight path the Gary ordinance imposes a height limitation of 18 feet on respondents' property, it is apparent that the ordinance does not meet the standards suggested in the Model.

We have pointed out at pages 27-28, *supra*, that the Administrator of the Federal Aviation Agency has issued regulations prescribing the conditions that must be met if federal aid is to be granted for the construction of an airport and that these regulations require that an adequate property interest be acquired in "runway clear zone areas." We have also pointed out that under these regulations respondents' property is well within the "runway clear zone" of the Gary airport. It is significant that the Administrator's explanation for the adoption of the runway clear zone regulation makes it clear that he acted on the basis of constitutional doctrines. That explanation states:

> ". . . in absence of special circumstances, adoption of height limit regulations without compensation under the State police power is of questionable legal validity if the height limits prescribed

> *are low and run the risk of constituting a taking of property without compensation, contrary to the State and Federal constitutions.* Consequently, in the absence of unusual circumstances, the adoption of protective measures by legislation cannot be considered a satisfactory substitute for the acquisition of property interests for the entire runway clear zone area, and should be regarded as a possible alternative in any particular case only in the outer portions of the runway clear zone area and then only if and to the extent it can be determined that the applicable height limits are not confiscatory." 22 Fed. Reg. 7735 (1957) (emphasis supplied).

Petitioners point to a number of studies which they describe as "advocating airport zoning to protect aerial approaches." (Pet. Br. 29). Not one of these studies provides any support for petitioners' argument that the City of Gary can impose a height limitation of 18 feet to protect an aerial approach without the payment of compensation. In fact the so-called Doolittle Report, which was made to the President in 1952, is adverse to petitioners' contentions.[41] That report stated:

> "The power to zone . . . is a limited one. . . . Of primary importance . . . is the fact that it cannot go beyond the line of regulation and become an actual 'taking' of property without just compensation. . . . It also would appear evident that while any State action settling a 'navigable zone' for aircraft approaching an airfield could be justified on the broader ground of benefit to the

[41] The Airport and Its Neighbors: The Report of the President's Airport Commission (1952).

> community as a whole, it also might be considered a 'taking' which could only be accomplished through eminent domain if, in fact, it resulted in a substantial diminution of value of the land."[42]

To meet this problem where it was most acute—in the area immediately adjacent to airport runways—the Report recommended establishment of "an extension or over-run area at least one-half mile long and 1,000 feet wide" measured from the ends of the dominant runways. These areas would be "incorporated in the airport itself."[43] In other words, the Doolittle Commission thought that the answer to the problem of obstructions in the areas immediately adjacent to airport runways was acquisition of land up to one-half mile beyond the dominant runways. This recommendation may be compared with the instant case, where respondent's property was only 1,043 feet beyond the present end of the Gary airport runway, and, according to petitioners (Pet. Br. 7, n. 3), a mere 443 feet beyond the end of the proposed runway.

Petitioners argue that height limitations are "strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight." (Pet. Br. 43). This in effect is an argument that any regulation reasonably related to a legitimate governmental objective can never be a taking within the meaning of the fourteenth amendment. The argument rests on a misconception of the law. Even an exercise of the power of eminent domain must be reasonably related to a proper governmental purpose because otherwise property is not taken for public use. It follows

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[42] Id. at 72.

[43] Id. at 7, 36.

that the question whether an exercise of governmental power is merely regulatory in character or amounts to a taking for which compensation must be paid cannot be resolved merely by demonstrating that the exercise is reasonably related to a proper governmental purpose. As this Court said in *Delaware, L. & W. R.R.* v. *Town of Morristown,* 276 U.S. at 193:

> "But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393, 416. The police power may be and frequently is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him."

The issue here, therefore, is not whether there is any way in which the City of Gary can properly act to protect airport approach zones but whether the City chose a constitutionally correct method of achieving that legitimate governmental objective. That question turns on whether the zoning ordinance, by imposing a height limitation of 18 feet, so substantially interferes with the normal and reasonable use of property as to constitute a taking for which compensation must be paid. On that point the decisions of this Court in *Causby* and *Griggs* and the actions of the federal aviation au-

thorities described above show that the ordinance transcends constitutional limitations."

Both the petitioners and certain of the *amici curiae* seek to draw support from the decisions relating to the validity of comprehensive zoning laws. We submit that there is a distinction between such laws and height limitations in airport zoning regulations that makes these arguments inapposite on the question whether there has been a taking in the present case. A comprehensive zoning regulation does not give an adjoining landowner or anyone else a right to use the property that is zoned. It merely imposes upon all landowners in the area affected uniform restrictions as to the use of their land that are as-

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" Petitioners cite decisions by the courts of Florida and Alabama sustaining airport zoning regulations. (Pet. Br. 40-42). These decisions do not stand for the broad proposition that in all circumstances a zoning regulation is a permissible constitutional means for establishing airport approach zones. In two of the cases the courts upheld the regulations in question against challenges to the regulations in their entirety without regard to their application to particular property. The third held that an airport zoning regulation was not invalid as applied to the particular facts there involved. In all three cases the courts recognized that such regulations might in other circumstances so interfere with the reasonable use and enjoyment of property as to constitute a taking for which compensation would have to be paid. Baggett v. City of Montgomery, 160 So.2d 6, 9 (Ala. 1963); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439, 445 (Fla. 1959); Waring v. Peterson, 137 So.2d 268, 272 (Fla. App. 1962). For state decisions holding that the application of airport zoning regulations to particular property constituted a taking for which compensation was required see Roark v. City of Caldwell, 394 P.2d 641 (Ida. 1964); Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal. Rep. 318 (1963); see also Bowling Green-Warren County Airport Board v. Long, 364 S.W.2d 167, 171 (Ky. App. 1962).

sumed to be for the benefit of all. In contrast, a height limitation in an airport zoning regulation is designed to regulate land use by the owner in order that his property may be used by others. In effect such a limitation gives to the operators of airports and aircraft a servitude over or an easement in the air space above the land to which the regulation applies. See *United States* v. *Causby*, 328 U.S. at 267. It therefore does not merely restrict the owner of particular land in the exercise of property rights but in fact transfers some of those rights to others. See *Sneed* v. *County of Riverside*, 218 Cal. App.2d 205, 209, 32 Cal. Rep. 318, 320 (1963); *Yara Eng'r Corp.* v. *City of Newark*, 132 N.J.L. 370, 373, 40 A.2d 559, 561 (1945). Such a limitation imposes a burden upon property in proximity to an airport that is more "direct and peculiar and substantial" than the burden imposed by a comprehensive zoning law. In another context this Court has recognized that in determining whether there has been a taking of property a distinction should be recognized between a burden of this character and a "diminution of the value of the property not directed or peculiarly affected, but sharing in the common burden." See *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 554, 557 (1914).

The essential difference between comprehensive zoning and airport zoning ordinances that impose height limitations in air approach zones may be illustrated by reference to the example adverted to in the opinion of this Court in *Griggs* v. *Allegheny County*, 369 U.S. at 89-90. No one would assume that a public authority could obtain the easements required for approaches to a bridge simply by promulgation of a zoning regula-

tion.[45] Yet that is precisely what petitioners are arguing that the City of Gary could constitutionally do in this case with respect to the approaches to the airport.

The peculiar nature of airport zoning regulations is a fact that should be taken into account in determining whether the application of an airport zoning ordinance to particular property constitutes a taking. This does not require the conclusion that all height limitations contained in airport zoning ordinances are necessarily invalid without regard to their character or the effect of their application. The point is that in considering whether a particular height limitation in an airport zoning ordinance as applied in a particular case is so "direct and peculiar and substantial" an interference with property rights as to amount to a taking, decisions relating to comprehensive zoning laws, which are designed to achieve different ends and which operate in a different way, are not controlling or persuasive.

Petitioners attempt to support their constitutional arguments by two other contentions that raise questions of Indiana law. The first contention is that respondent had no standing to raise a constitutional question as a defense in this lawsuit because it did not take advantage of the provision in the ordinance permitting it to seek a variance. On this point the Supreme Court of Indiana held that since the ordi-

[45] In the Griggs case this Court said (*ibid*):

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable."

nance did not contain a provision for compensation in the event that a variance was denied respondent was under no obligation to seek a variance as a condition precedent to raising the objection that the ordinance as applied to its property constituted a taking for which compensation should be paid. (R. 214-215). Whether respondent was required to exhaust its administrative remedies under the local ordinance is a question of Indiana law on which the decision of the court below is conclusive.[46]

It should also be noted that petitioners' contention ignores the practicalities of the situation. Respondent had settled all of its differences with the City of Gary relating to the location and construction of the highway and had agreed to pay the city $1,500,000. As a part of the settlement the city agreed to the route of the highway. Until this lawsuit was instituted respondnet had no reason to believe that there was any occasion for it to seek a variance.[47] In effect petitioners are arguing that because respondent in good faith relied upon this settlement agreement it should be precluded from raising any constitutional question once the ordi-

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[46] In support of this holding the court cited Finney v. Johnson, 242 Ind. 465, 179 N.E.2d 718 (1962).

[47] Apart from the settlement agreement there was another reason why it was unnecessary for respondent to seek a variance. It is well established that local zoning ordinances do not apply to state bodies having the power of eminent domain. See, *e.g.*, Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 174-75, 107 N.E. 2d 345, 350, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952); City of Medford v. Marinucci Bros. & Co., 344 Mass. 50, 181 N.E.2d 584 (1962); Rhyne, Municipal Law 306-07 (1957). This question was presented but not reached in the court below. (R. 210).

nance was made the basis of a suit by private parties. Furthermore petitioners' argument on the variance point is incongruous when viewed in the light of their insistence that respondent's toll road is a dangerous hazard to safe air navigation.

Petitioners' second point is that if there was a taking in this case respondent could have obtained compensation by a resort to the "inverse condemnation" procedure established by Indiana law. (2 Burns' Ind. Stat. § 3-1711 (1946 Repl.)). The court below held that this provision of the Indiana statutes did not apply in the instant case. It rested its holding on two grounds. The first was that under Indiana law the inverse condemnation procedure is not available unless there has been an actual encroachment on the land alleged to have been taken and that in this case no encroachment as yet had actually occurred. This holding turns entirely on the interpretation and application of Indiana law and is conclusive on this Court.[48] The second

[48] The court below reasoned that there could have been no encroachment on respondent's property because of a railroad catenary system and several obstruction light poles located beyond and extending well above the toll road. These pre-existing structures limited the glide slope to a considerably greater degree than would have the toll road had it stood alone, and prevented aircraft from flying low enough to intrude into that portion of respondent's air space that was included within the airport approach zone. Petitioners dispute the Indiana court's interpretation of the inverse condemnation statute (Pet. Br. 46, n. 49), but these efforts are pointless because this Court will not revise the Indiana court's interpretation of Indiana law. Petitioners also contend that the court's finding that there was no actual encroachment in respondent's air space is inconsistent with its earlier determination that the ordinance, if applicable to respondent's land, would constitute a taking. (*Ibid.*). Petitioners overlook both the nature of their suit and the nature of the basic holding of the court below. The gist of petitioners' complaint was that the ordinance had not been but should be enforced against respondent. The court below did not

ground for the holding was that under Indiana law the inverse condemnation procedure is not available where the taking is accomplished pursuant to a zoning regulation that makes no provision for compensation. (R. 216-217). This holding was correct because any contrary result would have required the court to assert legislative authority by requiring the expenditure of public funds in circumstances and for a purpose not contemplated by the legislative enactment. But whether correct or not the holding is an interpretation and application of an Indiana statute and raises no question for review by this Court.

2. The Theory of Petitioners' Claim for Damages Necessarily Assumes That the Zoning Ordinance Effected a Taking of Property Rights.

The basic legal theory relied upon by petitioners to support their claim for damages rests on the assumption that the zoning ordinance constituted a taking of property rights. The petitioners are seeking damages for alleged loss of future profits which it is claimed will be inflicted because respondent's road extends into the airport approach zone to a height prohibited by the zoning ordinance. It is apparent from petitioners' complaint and from their arguments in the court below that their claim is based on the ground that they have *property rights* in the airport approach zone that respondent has invaded. Petitioners' theory is that they obtained these property rights under the lease that they executed with the City of Gary in 1950. Paragraph 3-k(6) of their complaint alleged that under the lease petitioners obtained "the right of ingress and

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hold that the ordinance had been enforced and that there had been an unconstitutional taking but that the ordinance if applied to respondent's property would constitute an unconstitutional taking.

egress" to and from the airport and that this right was extended to "all those dealing with these plaintiffs and the aviation business." (R. 5). Paragraph 5-d of the complaint further alleged that the establishment of respondent's highway constituted an unlawful taking of the petitioners' property rights without compensation and without due process of law. (R. 9). The theory underlying these allegations was made more explicit in the brief filed by petitioners in the court below. In that brief petitioners argued that "the zoning provisions constituted easements appropriated by the City which became a part of our leasehold." (p. 24). They further argued that the toll road "invaded the air space composing our way of ingress and egress to the airport." (p. 25).

Petitioners' determination to base their cause of action on their asserted property interest in the air space constituting the airport approach zone was not fortuitous but was designed to avoid a difficulty that might otherwise have been a serious obstacle to their claims. Conceivably petitioners might have attempted to proceed on the theory that an asserted violation of the zoning ordinance had inflicted injuries upon their business for which they were entitled to recover damages under the ordinary principles of tort law. Had they done so they would have been faced with the fact that the City of Gary had by its own actions precluded itself from applying the ordinance to respondent's property. In those circumstances petitioners would have been faced with the formidable if not insurmountable difficulty of justifying the assertion of an ordinary claim in tort based on an alleged violation of a municipal regulation that the municipality itself was disabled from enforcing against respondent. Petitioners

avoided this difficulty by taking the position that their lease from the City conveyed to them property rights in the air space above respondent's land which respondent had invaded by the construction and maintenance of the highway.

The serious character of the difficulty that petitioners thus sought to avoid will be apparent from a brief recital of the facts relating to transactions between respondent and the City of Gary that preceded the construction of the road.

Differences had arisen between the city and respondent after respondent announced its intention to construct the road, the former being concerned lest the road interfere with certain city streets, sewer lines, and the northwest-southeast runway of its airport (not the runway in question in this case). These differences led to a lawsuit. In August 1955 a settlement agreement was made between the City of Gary and respondent that was intended to resolve all controversies, including the lawsuit.

The agreement specifically approved the route of the toll road as set forth in an exhibit attached thereto (except for modifications and changes provided in the agreement). The agreement required that the proposed road be rerouted in the vicinity of the northwest-southeast runway of the airport in order to preserve a 50-1 glide angle. But it did not require that the proposed road be rerouted insofar as it affected the glide angle of the north-south runway (the one involved in this case). Hence, by its terms, the agreement approved respondent's proposal for that portion of the road, which was ultimately constructed in accordance with the proposal. Moreover, the agreement provided for a consideration of $1,500,000 to be paid to the city

by respondent on account of the damage that the city would suffer as a result of the construction and operation of the toll road. The agreement recited the "mutual desirability" of an "amicable adjustment" of the controversies between the parties and of the "early construction" of the toll road and included a covenant by the city to "cooperate with the Commission in order that the East-West Toll Road through Gary may be expedited." (Def. Ex. D, Tr. 949).

The agreement was submitted to and approved by the Board of Aviation Commissioners of the City of Gary, the Mayor of the City of Gary, and the Common Council of the City of Gary, the body that enacted the Gary Airport Zoning Ordinance (*Id.*, R. 157). This agreement extinguished whatever capacity the City may have had to enforce the airport zoning ordinance to prevent the road's construction and left respondent free, so far as the City was concerned, to construct the road in the location and at the height disclosed by its proposals, which is exactly what respondent did.

It is significant that the City of Gary has adhered to the settlement agreement and has made no attempt to enforce the zoning ordinance against respondent. It is also significant in this connection that the court of first instance in Indiana did not grant petitioners' prayer for injunctive relief, possibly because it recognized the incongruity of requiring respondent to remove or to modify a road whose location and construction the City of Gary had itself approved.[49] In no sense can it be said that this case is an attempt to remove from the air approach zone a hazard to air navigation. The City of Gary has made no such attempt and the court below denied petitioners this kind

[49] Petitioners did not appeal the denial of injunctive relief.

of relief. In the present posture of the case petitioners are simply attempting to require respondent to pay them $164,000 for an alleged invasion of their property interests.

It is by no means clear that by choosing to base their claim upon an invasion of alleged property interests, as contrasted with the violation of a police regulation, petitioners have been successful in avoiding the difficulties created by the settlement between the City of Gary and respondent. But that point aside, petitioners' adoption of the theory that they are entitled to recover damages for the invasion of property interests is fatal to their argument that there would not be a taking if the ordinance should be applied to respondent's property. If, as petitioners assert, they are now the owners of "easements" in the air space that constitutes the airport approach zone, the question arises as to the origin of that property interest. It is petitioners' theory that the property interest was conveyed to them by the City. It also seems to be their theory that the City acquired this property interest by reason of the zoning ordinance. But if, as petitioners assert in their brief in the court below (p. 24), "the zoning provisions constituted easements appropriated by the City" then it necessarily follows that this interest was appropriated from the owner of the land, an appropriation that plainly constituted a taking for which no compensation was ever paid.

CONCLUSION

For the foregoing reasons (1) the writ of certiorari should be dismissed because the judgment of the Supreme Court of Indiana rests on an independent and adequate state ground or (2) in the alternative, the

judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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November 1964

APPENDIX A

Excerpts from Model State Airport Zoning Act (November 7, 1944)

CIVIL AERONAUTICS ADMINISTRATION, U. S. DEPARTMENT OF COMMERCE

and

NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

* * * * * * * * * * *

Section 6. Airport Zoning Requirements.

(1) *Reasonableness.* All airport zoning regulations adopted under this Act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this Act. In determining what regulations it may adopt, each political subdivision and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

* * * * * * * * * * *

Section 11. Judicial Review.

* * * * * * * * * * *

(6) In any case in which airport zoning regulations adopted under this Act, although generally reasonable, are held by a court to interfere with the use or enjoyment of a particular structure or parcel of land to such an extent, or to be so onerous in their application to such a structure or parcel of land, as to constitute a taking or deprivation of that property in violation of the Constitution of this State or the Constitution of the United States, such hold-

ing shall not affect the application of such regulations to other structures and parcels of land.[14]

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[14] It has been suggested that provisions be included in this model act giving a landowner a right to compensation where the application of airport zoning regulations to his property otherwise would constitute an unconstitutional taking of his property, and prescribing the procedure to be followed in obtaining such compensation. It appears that several such procedures might be devised, including: (1) the bringing of a court action by the landowner for damages; and (2) the filing of a claim for compensation with the Board of Adjustment, with the Board either (a) making the award itself, subject to appeal to a court, or (b) determining merely that compensation is due, the effect of such a decision being to require the political subdivision to bring condemnation proceedings as authorized in Section 13.

The principal advantages to be gained by so providing for compensation where a zoning regulation is too great an invasion of private property rights is that this would go far to prevent the invalidation of any such regulation and permit the imposition of zoning restrictions as stringent as necessary to prevent the establishment of any airport hazard, regardless of their effect upon the property owners. However, the inclusion of any such provisions would make those political subdivisions that adopted regulations liable for damages which they could not foresee or estimate with any great degree of accuracy, which might well outweigh the advantages noted. Largely for this reason, no provisions such as those suggested have been included in this model act.

As a result, if any regulation adopted under this act attempted to impose a restriction upon any particular property which could not be imposed without compensation, the remedy available to the landowner would be to bring suit to have it declared unconstitutional and invalid, rather than an action for damages. This would leave it to the political subdivision or owner of the airport to acquire property interests in the property in question under Section 13, which might be deferred until this should become necessary to prevent the threatened creation of an airport hazard.

While it will therefore be necessary that any airport zoning regulations adopted under this act be carefully formulated to the end that they may be generally rasonable in their application to the property zoned, the inclusion of this subsection (6) should help to prevent invalidation of the entire ordinance or resolution, or even any particular section thereof, where it is held unreasonable in its application to a particular structure or parcel of land.

* * * * * * * * * * *

Section 13. Acquisition of Air Rights. In any case in which: (1) it is desired to remove, lower, or otherwise terminate a non-conforming structure or use; or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Act; or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision within which the property or non-conforming use is located or the political subdivision owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, such air right, aviation easement, or other estate or interest in the property or non-conforming structure or use in question as may be necessary to effectuate the purposes of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS DOING BUSINESS AS CALUMET AVIATION COMPANY, PETITIONERS

v.

INDIANA TOLL ROAD COMMISSION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States is filing the present memorandum to express its concern over the apparent ruling in this case that the imposition of height limitations on future construction abutting a municipal airport necessarily amounts to a partial "taking" of the land for which "just compensation" must be paid and the corollary that the federal Constitution prohibits an attempt to achieve the objective by zoning. We voice our views because of the broad scope of the ruling, invalidating "as an entirety" the zoning ordinance in suit on the ground that it deprives the landowner of part of "the ordinary usable air space" above his property, albeit the ordinance itself does not

purport to appropriate that air space for public use and "there had not been any actual encroachment" by overflights or otherwise. Our submission does not reach the ultimate question—which the court below did not separately consider—whether (assuming every restriction on "usable air space" does not amount to a "taking") the particular application in suit gives rise to a constitutional duty to pay compensation because, with respect to the respondent, the effect of the ordinance was to zone too close to the ground. Nor, finally, do we consider it appropriate to comment upon the very substantial question whether, since the court below held that the challenged ordinance violated Article 1, § 21, of the Indiana Constitution as well as the Fourteenth Amendment of the federal Constitution, the decision rests upon an independent State ground, depriving this Court of jurisdiction. The interest of the United States is confined to the issue on the merits, and comment by us on the jurisdictional question would be gratuitous.[1]

[1] Inasmuch as it involves a claim of federal preemption, however, it is appropriate that we note our disagreement with petitioner's argument that the State ground of decision was not *adequate* because a State law forbidding airport height-limitation zoning would in any event violate the Supremacy Clause (Pet. Br. 53–56). It may be true, as petitioners argue, that the Federal Airport Act assumes that "local power to zone exists," but the form of assurance completed by the grantee in this respect carefully requires only that it act "[i]nsofar as it is within its power" (Pet. Br. 28). There is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.

1. *Interest of the United States*

We need not detail here the extent of the government's participation in the financing, regulation and operation of airports. The applicable statutes, regulations and contracts were fully canvassed by this Court in its recent decision in *Griggs* v. *Allegheny County,* 369 U.S. 84. In light of its interest in promoting air transportation, the United States is of course concerned that airports be planned to provide safe approach areas, free of dangerous obstructions for the planes, and, so far as possible, safe and tolerable for the surrounding inhabitants. Indeed, the Federal Aviation Agency prescribes the necessary standards for glide paths in detail and the provisions of the ordinance in suit in this respect conform to the federal regulation. Nor is the government indifferent to the manner in which such safe approaches are created. Because cost is a factor and because zoning offers other advantages, the United States is committed to the view that, within reasonable limits, local authorities should be encouraged to restrict the use of land surrounding airports by appropriate zoning laws, which, of course, include height limitations.

It was to this end that the Federal Aviation Agency, some years ago, promulgated a "Model Airport Zoning Ordinance" which includes appropriate height restrictions for the approach areas (see Appendix F to Brief for Petitioners, pp. 27a–45a). And, in furtherance of that goal, the Agency early this year recommended the enactment of the Federal Airport Act

Amendment (P.L. 88-280, 78 Stat. 158, 161).[1] The Congress shared the same concerns. The Senate Committee to which the proposed legislation was referred discussed the subject at some length in its report and stated (S. Rep. No. 446, 88th Cong., 1st Sess., pp. 22-23):

> The growing seriousness of the aircraft noise problem cannot be ignored or dismissed with the attitude that time will eventually effect a solution. Within reason, every present means to alleviate noise should be employed. The committee is convinced that the single most important means is to insure adequate zoning and that the proposed amendment will contribute to such an effort. * * *
>
> * * * * * *
>
> The Federal Government has a legitimate interest in encouraging appropriate land use in order to protect its investment in airports through the Federal airport program. However, the primary initiative should rest with the local governments, and the Federal Government's approach should be one of cooperation and assistance and not one of preemption or dictation.[2]

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[1] The communication from the F.A.A. to Congress (H. Rep. No. 1002, 88th Cong., 1st Sess., p. 14) describes the purpose of the measure: "This is intended to more clearly express the Federal Government's concern and intention to assure that land use planning in the vicinity of airports is more fully compatible with aircraft operations."

[2] During the hearings, Mr. Halaby, the F.A.A. Administrator, illustrated the problem by the specific illustration of Dulles Airport as follows:

> Senator MONRONEY. We have a good test case, I think, in Dulles airport, where at a great cost and distance from the city of Washington, the Government sought to get the

The law now requires the federal Administrator, before granting funds for the establishment of airports, to receive written assurance from local authorities that—

> appropriate action, including the adoption of zoning laws, has been or will be taken, to the

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ideal airport, an airport located far enough from the city so that the city would be insulated against the noise problem. This required a substantial expenditure on access roads to provide rapid ground transportation.

Now what shape are we in actually here at Dulles? I hear rumors and reports that off the end of both runways, there are some developers who have already started housing projects.

Mr. HALABY. Mr. Chairman, the first step, of course, was for the Congress to authorize and fund the purchase of a very large acreage of land, some 10,000 acres. The second was for President Eisenhower and my predecessor, to select a site at some distance from the center of the traveling population. The third was to lay out the airport and to landscape it in such a way that the noise from operations thereon would be reduced as much as possible within this area.

But, that is not entirely adequate and the two counties at the boundaries of this magnificent new airport have a responsibility to their citizens in the future, as well as to their special interests in the present. It appears that one of those counties, despite very strong pleadings by the Federal Aviation Agency to take the long general public interest view rather than the short special interest view, has permitted zoning for housing development under the path of takeoffs and landings on one of the runways.

The other county seems to be taking a long range planning point of view and we are very hopeful that they will zone and develop the area in such a way that it will be quite compatible with safe and efficient use of the airport. Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 1153, to Amend Federal Airport Act, p. 22. Statements at the hearings by others concerning the zoning provision appear at pages 28, 51, 81–85, 95–96, 140.

extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.

2. *Scope of the ruling below*

As we have said, the United States is concerned because of the breadth of the ruling below, insofar as it is predicated on the federal Constitution. The Indiana Supreme Court did not merely decide that, in the particular circumstances of this case, a prohibition on construction above 18 feet, as applied to the present respondent, amounted to a "taking." Rather, it broadly held that the Fourteenth Amendment bars any attempt to forbid by zoning the use of any portion of the "ordinarily usable air space" above land surrounding an airport and that such a restriction necessarily amounts to a "taking" for which compensation must be paid, even though the taker has in no sense "occupied" the cleared airspace, by flights or otherwise.

As petitioner notes, there is language in the opinion below declaring the Gary airport ordinance "invalid as an entirety" (R. 214) and "wholly void" (R. 217). But we need not rest on these expressions alone. The thrust of the opinion as a whole is that the federal Constitution views as a "taking" for which compensation is due any zoning restriction (at least if imposed for airport purposes) which effectively deprives a landowner of any part of the "ordinarily usable air space" above his property. To be sure (as respondent points out), after announcing general principles,

the decision adverts to the question "whether an unconstitutional taking has resulted in the instant case" (R. 214; also, R. 211). The answer given, however, is wholly unrelated to the particulars of the case. Nothing is said about the character of the land surrounding Gary Airport, much less respondent's tract. Nor does the opinion focus on the effect of the ordinance here to prohibit construction above 18 feet—as opposed to its effect at a greater distance from the airport, or at another point on the boundary of the airport property. Indeed, no distinction is made between the more severe height limitations imposed in the "inner area approach zones" (here involved) and those applicable to other land surrounding the airport (see R. 153–154 and Pl. Exh. 3A, R. 158). For the court below, it was apparently enough that the ordinance purported to deprive neighboring property owners of some part of the "ordinarily usable air space" above their land, which presumably might reach even beyond the 150-foot ceiling imposed on all land use within 2 miles of the runways (see R. 153–154).

Nor is the ruling below narrowed by the finding that, through the airport zoning ordinance, the City has attempted to "appropriate" the cleared airspace "to its own use" (R. 214). There may be an implication here that the Indiana court views height limitations enacted for airport purposes differently from similar restrictions in a more comprehensive zoning law, presumably because the former are thought to serve a less general public purpose, being for the special benefit of the airport and its users. But there

is no suggestion that the City or its permittees have reduced the "appropriated" airspace to their own possession or otherwise occupied it. Nor could there be. The "taking" is said to have been attempted "by the passage of the ordinance," before any invasion of the disputed airspace could occur. Moreover, most of the cleared space—including the lower portion of the "glide path" involved here (see Pet. Br. 26a)—is not set aside for actual use; it is designed as a safety zone for emergencies, which normal flights will not invade. Finally, in point of fact, as the court itself emphasized, because of the other existing obstructions, "there had not been any actual encroachment upon * * * the air space over the land in question" (R. 216).

3. *The zoning power may properly be invoked to promote transportation by air*

Promotion of commerce by air is plainly a public purpose permitting ownership of airports. *E.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84. Implementation of that purpose by application of reasonable zoning limitations in the vicinity of such airports would seem to be equally an appropriate public activity. In holding that this may not be done, the Supreme Court of Indiana appears to have misunderstood the difference between regulation and a taking and the meaning of *United States* v. *Causby*, 328 U.S. 256, and the *Griggs* case.

Rejecting concepts of more extensive ownership, *Causby* held that ownership of real property includes ownership of "the immediate reaches of the superadjacent airspace" (328 U.S. at p. 266). But it does

not follow, as the Supreme Court of Indiana appears to have reasoned, that this right is absolute and is not subject to reasonable regulation in the public interest. The question here is not whether there would be a taking if aircraft flew at the level of the base of the glide angle. In this case there have been no flights and the court below held the ordinance void in its entirety. In *Causby* and *Griggs*, on the other hand, there was no zoning issue, for, there, aircraft had actually invaded the property of the landowner and interfered with its existing use. Whether the property right in airspace is subject to reasonable police power regulation was not before the Court in those cases.

This Court answered the basic question here presented almost 40 years ago in *Euclid* v. *Ambler Co.*, 272 U.S. 365, when it said concerning zoning laws (p. 387): "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." The law there involved, among other provisions, established height limitations ranging 35 to 80 feet (272 U.S. at 381). This Court said (p. 388):

> There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which

> must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey*, 214 U.S. 91; *Hadacheck* v. *Los Angeles*, 239 U.S. 394; *Reinman* v. *Little Rock*, 237 U.S. 171; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–530.

The zoning power has been upheld, although it effectively barred a beneficial use to which property had previously been devoted. *Goldblatt* v. *Hempstead*, 369 U.S. 590. And prohibitions against use of particular portions of property have been sustained in *Gorieb* v. *Fox*, 274 U.S. 603, 608, the validity of regulations limiting "the extent of [the owner's] use of the space above his lot" being assumed. *Welch* v. *Swasey*, 214 U.S. 91; *Zahn* v. *Bd. of Public Works*, 274 U.S. 325. No distinction can reasonably be made in the present case because the zoning law is in aid of operation of the public airport. Indeed, the public interest here would seem to be more direct than the usual zoning controlling privately owned property.*

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*Recent periodical literature on this subject appears in Strunck, *Airport Zoning and Its Future* (1964), 50 A.B.A. Journal 345; Note, *Airport Zoning as a Height Restriction* (1962), 13 Hastings L.J. 397; Note, *Zoning—The Airport and the Land Surrounding it in the Jet Age* (1960), 48 Ky. L.J. 273; Pogue, *Legal Aspects of Planning for Urban Heliports* (1960), 46 Va. L. Rev. 84; Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma* (1958), 56 Mich. L. Rev. 1313; Wolf, *Airport Approach Zoning—A Present Need* (1948), 17 Cincinnati L. Rev. 327.

4. The appropriate disposition of the case

All the parties in this Court seem to agree with the general principle just stated—that the federal Constitution does not prohibit reasonable airport zoning, even though it deprives the neighboring landowner without compensation of some part of the ordinarily usable airspace above his property. Respondent defends the judgment below only on the ground that, as applied to its road, the zoning ordinance effected an unconstitutional taking. While we acknowledge that there are circumstances in which regulation of land use amounts to a taking, we express no opinion whether that point has been reached here, because, as we have said, it is our view that the Indiana Supreme Court did not decide that narrow question. Nor do we think it appropriate to ask this Court to decide it in the first instance. Accordingly (unless the Court dismisses the writ for lack of jurisdiction), we submit that the judgment below, insofar as it erroneously resolves the broad federal constitutional issue, must be vacated, and that the case should

be remanded for consideration of the narrow question presented in the concrete context of this case, as well as the several State law issues that remain.[6]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
Attorney.

NOVEMBER 1964.

---

[6] Among those are:

(1) Whether the zoning ordinance in suit was fully authorized by State law, a question expressly reserved by the opinion below (R. 210);

(2) Whether the ordinance, even if otherwise authorized, was intended to operate against another State agency possessed of the power of eminent domain (see R. 210);

(3) Whether the zoning ordinance grants rights to the plaintiffs such as to confer on them standing to maintain an action for damages;

(4) Whether the compromise entered into between the City of Gary and respondent, which apparently approved the present location of the toll road (see Respondent's Brief, pp. 55–56), does not preclude petitioners from claiming against the Commission (whatever their rights as against the City); and, finally,

(5) Whether the ordinance in suit—although it does not, on its face, offend the federal Constitution—falls under the Indiana Constitution.

U.S. GOVERNMENT PRINTING OFFICE: 1964

REPLY BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JESKOVICH AND PAUL JESKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET ASPHALTING COMPANY, *Petitioners*,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent*.

On Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR PETITIONERS

I. DEFENSE OF THE JUDGMENT UPON THE GROUND THAT THE ORDINANCE IN ITS SPECIFIC APPLICATION TO RESPONDENT'S PARTICULAR PROPERTY EFFECTUATES A TAKING IS PROCEDURALLY BARRED

Respondent's brief on the merits constitutes a confession of error. The sole ground upon which the judgment below rests is that the ordinance is a "wholly void" (R. 217) enactment "invalid as an entirety" (R. 214). Respondent does not even attempt to defend the judgment on this ground. It urges instead, as the exclusive basis for sustaining the judgment,

that the ordinance is invalid only in the special circumstances of its specific application to the respondent's particular property.[1] This is a brand new thought, with which the courts below were not favored, advanced for the first time before this Court. Until now the ordinance was never challenged as, and the court below never held that it was, arbitrary in the circumstances of its specific application. It was attacked as, and was held by the court to be, void on its face because it prescribed limitations on the use of property surrounding the airport. It was a blanket proscription of airport zoning which was sought and secured. Respondent thus retreats from a position it cannot hold to a position it cannot take.

A. The record as made is confined to an attack upon the ordinance on its face

As the court below observed (R. 210), the validity of the ordinance was first put in issue on an objection to its admissibility in evidence (R. 56). The ground of objection was altogether abstract, respondent urging that the ordinance was "defective, unenforceable, void and unconstitutional" in that (R. 56):

> . . . the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;
>
> . . . the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary,

[1] Res. br. pp. 1-2, 7, 8, 10-11, 15, 17, 18-19, 29-30, 31, 32-36.

> Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain. . . .

The objection was overruled and the ordinance admitted into evidence (R. 56-58). At this stage, on an objection to the admissibility of the ordinance into evidence, nothing but the validity of the ordinance on its face could have been put into issue. Authenticity aside, there is no way of excluding the ordinance from evidence except on a claim that it is a legal nullity. A claim of arbitrary application of the ordinance, as distinct from its invalidity on its face, would require rather than bar receipt of the ordinance into evidence.

The same abstract attack on the validity of the ordinance on its face was maintained throughout the proceeding after the admission of the ordinance into evidence. According to the court below, the "same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled" (R. 210). That motion, with no particularization of reasons, simply asked "the court to find for the defendant . . . and against the plaintiffs . . ." (Tr. 236-238, 240). After a judgment had been entered in petitioners' favor at the conclusion of the whole case, in a motion for a new trial, respondent *in haec verba* repeated the identical objection to the ordinance which it had expressed in seeking to exclude it from evidence (Tr. 254-257). No other constitutional objection to the ordinance was ever articulated at the *nisi prius* level. No evidence of arbitrary application was tendered. No such issue was tried.

On appeal, respondent again restricted its constitutional argument to the identical abstract attack upon

the validity of the ordinance on its face.[2] As it stated in its brief below, "The third reason for the invalidity of the ordinance is its unconstitutionality, *as urged by appellant in its objections to the admissibility of the ordinance and the maps or plans offered by appellees.* (Tr. pp. 622-625)."[3] Respondent thus recurred to the precise objection with which it had begun. And the exact judgment which the court below rendered in its favor was to direct the trial court "to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence" (R. 217). Thus, the motion to be sustained was a finding in favor of respondent at the close of petitioners' case *in advance of any possible evidence to be introduced by respondent of arbitrary application of the ordinance.* And the motion to be sustained, as read by the court below, asserted the "same issue" as had been originally raised by respondent's objection to the admissibility of the ordinance into evidence (R. 210).

The record as made, therefore, presents solely the issue of the validity of the ordinance on its face, with no possible question of specific application presented, preserved, or decided.

B. Under clear and settled Indiana law, in the absence of prior application for a variance, respondent was restricted to an attack upon the ordinance as void on its face in its entirety

Respondent's restriction of its attack upon the ordinance as void on its face in its entirety was neither inept nor inadvertent. The course it followed was required by utterly clear and settled Indiana law. Under

[2] Respondent's brief below pp. 238-243.

[3] *Id.* at 238, emphasis supplied.

that law, in the absence of prior application for a variance under the terms of the ordinance, the only judicial attack upon the zoning ordinance that an aggrieved property owner is free to make is that the ordinance is void as an entirety on its face.[4] In this case, since no variance had been sought, respondent had no alternative but to level its attack upon the ordinance as void in its entirety.

This is clear on the face of the opinion of the court below. As it states, "a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365 . . .; 1 Metzenbaum, op. cit. *supra*, at 708" (R. 214). In *Euclid*, this Court held that, notwithstanding the failure to seek a building permit or apply to the zoning board of appeals for relief, an attack on the zoning ordinance was not premature because "the attack is directed not against any specific provision or provisions, but against the ordinance as an entirety." *Id.* at 386.[5] The distinction is put beyond doubt at the

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[4] *City of East Chicago* v. *Sinclair Refining Co.*, 232 Ind. 295, 111 N.E. 2d 459, reprinted *infra* pp. 1a-15a; *Indiana ex rel. City of South Bend* v. *Saint Joseph Superior Court*, 238 Ind. 88, 148 N.E. 2d 558, 560 (administrative remedy must be exhausted except where the attack made is that "the zoning ordinance was void in its entirety"); 1 Metzenbaum, Law of Zoning, 712, 727-728 (2d. 1955), explaining Indiana law. Indiana generally requires exhaustion of the administrative remedy as a precondition to judicial recourse. *State* v. *Rawlings*, 229 Ind. 552, 99 N.E. 2d 597, 600; *Illinois Central R. Co.* v. *Public Service Comm.*, 225 Ind. 643, 75 N.E. 2d 900, 903; *Hooser* v. *B. & O. R. Co.*, 279 F. 2d 197, 199 (C.A. 7) (". . . Indiana Courts have required exhaustion of administrative remedies prior to resorting to the Courts.").

[5] This is of course the general federal rule. *E.g.*, *Staub* v. *Baxley*, 355 U.S. 313, 319.

cited page of the Metzenbaum treatise to which the opinion below refers (emphasis in original):

> The usual requirement that a complainant must exhaust his available Administrative Remedies, before the courts will entertain such complainant's action, is divided—at the very outset—into *two*, dissimilar situations, to wit:
>
> (a) When a court-proceeding alleges that the zoning ordinance or regulation is unconstitutional in its *Entirety*, and that the very existence of "the ordinance and maintenance thereof, in effect, constitutes a present invasion of the complainant's property rights and a threat to continue it", and—on the other hand:
>
> (b) When the court action is aimed merely "against any *specific* provision or provisions" of a zoning ordinance, as they apply to complainant's particular property.
>
> In the former (a) instance—when a zoning ordinance is thus attacked in its *entirety*, it is *not* necessary to have employed the available administrative remedies, such as applying for a permit or going before the board of appeals, before entering court, or applying to the Legislative body.
>
> But, when a zoning ordinance, in the latter (b) situation, is attacked as to unconstitutionality or unreasonableness of a "*specific* provision" (or provisions) as it affects complainant's particular property, such complainant *is* required to employ the available *administrative* remedies, *before* the courts will entertain such action.

This distinction was a fully settled aspect of Indiana law at the time the instant action was instituted on July 26, 1956 (R. 1). The second edition of the Metzenbaum treatise cited by the court below, published in 1955, lists Indiana as an adherent of the distinction

and quotes its leading decision.[6] In 1953, in a lengthy consideration of the question, the Indiana Supreme Court confirmed its commitment to the distinction. *City of East Chicago* v. *Sinclair Refining Co.*, 232 Ind. 295, 111 N.E. 2d 459, reprinted *infra*, pp. 1a-15a. It observed that the "administrative procedure provided by the zoning statute and which must be followed before recourse to the courts may be had, insures the benefit of trained and experienced opinion and judgment in zoning matters applied to the facts of each particular case." 111 N.E. 2d at 467.

In short, in this case, the only attack on the ordinance that respondent was free to make was that it was invalid as an entirety. Its failure to invoke the remedies provided by the ordinance precluded any other course. It could not assail application without first having sought administrative relief.

C. In conformity with the record as made, and in keeping with Indiana law which restricted the issue to the validity of the ordinance in its entirety, the only decision rendered by the court below was that the ordinance was wholly void

In conformity with the single and limited issue tendered by the record as made, and in keeping with clear Indiana law which restricted the issue to whether the ordinance was a nullity on its face, the court below decided no question of application but confined its determination to the conclusion that the ordinance was a "wholly void" (R. 217) enactment "invalid as an entirety" (R. 214). No other issue was open. No question of application could have been decided.

The opinion below shows on its face that the court did not decide a different question from that which the

[6] 1 Metzenbaum, Law of Zoning, 712, 727-728 (2d ed. 1955).

record presented and Indiana procedure allowed. In describing the issue tendered the court below asked (R. 210):

> . . . does the ordinance purport to effect a taking of property for public use. . . .

In expressing the first branch of its conclusion, the court below stated (R. 213):

> . . . we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

In expressing the second branch of its conclusion, the court below stated (R. 214, emphasis supplied):

> . . . it becomes apparent that the City of Gary has attempted, *by the passage of the ordinance under consideration,* to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary airport without the payment of compensation.

In concluding that a variance need not have been sought, the court below stated (R. 214, emphasis supplied):

> . . . a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is *invalid as an entirety.*

In restating its ultimate conclusion, the court below declared (R. 216):

> . . . we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

And in concluding that compensation via inverse condemnation was not available, the court below stated (R. 217, emphasis supplied):

> . . . the ordinance, upon which appellees' alleged property right is based, was *wholly void* insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is *wholly void* then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Finally, corresponding with the language of the opinion, the record, and Indiana procedure, the plain import of the court's rationale limits the issue to the nullity of the ordinance as a whole. The entire thrust of the opinion is aimed at invalidation of airport zoning as such and not to the particularities of specific application. It is plain that, whether the height limitation is 18 feet, 28 feet, 58 feet, or 108 feet, the reach of the rationale is identical.

Thus, every route to the ascertainment of meaning—rationale, language, record, and procedure—arrives at the same destination. The sole issue presented or decided was the invalidity of the ordinance in its entirety on its face unrelated to any claim or finding of actual adverse application. In the light of this showing, the snips from sentences italicized by respondent do not present even a colorable contention that application of the ordinance is the issue. Res. br. pp. 32-34. Furthermore, contrary to respondent's contention that the mere presence of a severability clause in the ordinance shows of itself that only application can be at issue (res. br. p. 35), the severability clause is irrelevant in

view of the court's conclusion that the ordinance is invalid in its entirety. When the whole is invalid there is no occasion for separating the good from the bad.

D. This Court does not sit to review a different question than was pleaded, tried, appealed, or decided

Accordingly, as the only issue presented, preserved, or decided was the validity of the ordinance on its face unrelated to application, that is the only issue before this Court on the merits. This Court does not sit to adjudicate a question that was not pleaded, tried, appealed or decided. Since respondent does not even attempt to defend on the only ground open to it, it has in effect confessed error.

Respondent is therefore wide of the mark when it urges that, even if the court below determined only that the ordinance was invalid in its entirety, this Court should nevertheless decide "whether the ordinance is invalid as applied to the particular property here involved" (res. br. p. 32, n. 33). This Court does not affirm a judgment upon a ground that the record does not present or preserve.[7] Objections not "made . . . below . . . nor . . . discussed by any of the state courts . . . cannot . . . be urged here." *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 229. "A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error." *Peck* v. *Heurich*, 167 U.S. 624, 629; see also, *Indiana Farm-*

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[7] *Peck* v. *Heurich*, 167 U.S. 624, 629; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257; *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 229; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281; *Safeway Stores* v. *Oklahoma Retail Grocers Assn.*, 360 U.S. 334, 342, n. 7.

er's Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281. There can hardly be anything more prejudicial than to be confronted for the first time in this Court with a claim that was not pleaded, tried, appealed or decided below. A question of application evokes uniquely a judgment based on a complex cluster of facts. To decide such a question without a trial addressed to that issue with particularity is to deny petitioners "their day in court; in other words, . . . equivalent to condemning them without affording them an opportunity to be heard." *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267.

Furthermore, respondent asks this Court to decide a question which the courts below would not entertain because procedurally barred by Indiana law. As we have seen (*supra*, pp. 5-7), in the absence of prior resort for administrative relief under the terms of the zoning ordinance, the Indiana courts will not adjudicate a claim based on application of the ordinance to particular property. Thus, since state procedure bars the issue, an independent and adequate state ground truly exists to preclude consideration by this Court of the question of application tendered by respondent.

Finally, equally mistaken is the suggestion of the United States that, upon vacation of the judgment following correction of the erroneous resolution of "the broad federal issue," the "ultimate question" of application should be remanded to the court below for consideration (br. pp. 2, 11-12). There is no "ultimate question" of application. That issue was injected into this case by respondent for the first time in this Court. The suggestion of the United States is incompatible

with the posture of this case and doubtless simply reflects a lack of familiarity with the record.[8]

II. ASSUMING THE QUESTION IS OPEN, THE RECORD FURNISHES NO BASIS FOR A TENABLE CLAIM THAT THE ORDINANCE EFFECTUATES A TAKING IN ITS SPECIFIC APPLICATION TO RESPONDENT'S PARTICULAR PROPERTY

As one means of demonstrating that the decision below rests on an abstract denunciation of airport zoning as such, the briefs of petitioners (pp. 47-48), the Attorney General of Indiana (pp. 38-41), and NIMLO (pp. 19-22) showed that the record was barren of any evidence which would support a reasoned conclusion that the ordinance effectuated a taking in the specific circumstances of its actual application to respondent's particular property. Respondent contends, however, that an 18-foot height limitation in a highly industrial area of itself suffices to establish a taking, implicitly excluding the relevance of any other factors from the judgment to be exercised (res. br. pp. 12-13, 42, 43-44, 47). Respondent's contention is virtually as abstract as the decision below.

1. Respondent's threshhold assertion of an 18-foot height limitation in a highly industrial area contains in itself exceedingly debatable factual issues.

(a) The land underlying the aerial approach to the north-south runway from the south—which is the area relevant to the issue of application that respondent

[8] The questions open on remand are accurately stated at p. 7, n. 9 of respondent's brief. They are not correctly stated at p. 12, n. 5 of the brief of the United States; question 3 has never been in issue, and question 5 presupposes the scope of this Court's decision under the Fourteenth Amendment and the Supremacy Clause.

asserts—is not industrialized at all. The Grand Calumet River is the boundary line dividing the southern part of the airport property from the toll road property. The toll road land to the south of the Grand Calumet River is marsh (R. 131). To the south of this marsh land is the track of the Chicago South Shore and South Bend Railroad, and the present distance between the river and the track is 411 feet (R. 131, 159, 185, pl. ex. 10, sheets 2 and 3, R. 56-58, 48). To the south of the track the area is residential (*ibid.*). An aerial photograph of the southern approach to the north-south runway shows that the land between the toll road and the track, as well as to the immediate south of the track, is undeveloped (R. 34-35, 183). It is the area to the east, north, and west of the airport, but not to the south, which is industrialized and zoned for that purpose (R. 130-131).

Accordingly, transposed to the factual situation which exists, respondent contends that an 18-foot height limitation on undeveloped marsh land abutting the river, with an additional 1-foot vertical allowance for each 40 horizontal feet from the river, is too restrictive because other unrelated areas are industrialized. Respondent would not even tolerate a setback from the water's edge. The Constitution enshrines no such absolutism.

(b) Nor is the relevant height limitation 18 feet. The toll road was not constructed on the river's edge. It was constructed partly on the river bed itself; the toll road shifted the river bed north a distance varying from 100 to 175 feet; at the point where the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved across the existing south line of the airport property by 175

feet, approximately the width of the river (R. 53-54, 184-185). At the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures is 22.45 feet (pet. br. p. 8).

22.45 feet, not 18 feet, is thus the relevant height limitation, unless respondent can demonstrate the unreasonableness of an assumption by the lawmakers at the time the ordinance was enacted that (1) structures would not be erected on the river bed, or that (2) they are not constitutionally compelled to allow a river bed to be used for elevation of structures. But the record does not even show that respondent had obtained a property interest in the river when it acquired its right-of-way in 1954 and 1955 (R. 50, 58). The record does not show whether respondent's fee extends to the thread of the river, the water's edge, or the high or low-water mark. It surely does not show that, wherever the boundary is located, respondent was entitled to flood the land of the riparian owner on the opposite shore by diverting the flow of the river. There may be something unrevealed peculiar to the facts or the water law of Indiana which justifies respondent's action, but the record discloses nothing but a naked trespass. Accordingly, so far as the record shows, respondent's claim is unsupported by even the most absolutist notion of the attributes of property ownership.[9]

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[9] Respondent appears to begrudge the accuracy of our statement (pet. br. pp. 4, 7 and n. 3, 8, n. 4) that there exists 600 unconstructed feet, rather than 300 unconstructed feet, at the south end of the existing north-south runway (res. br. pp. 5, n. 6, 6, n. 8, 46). We would be delighted to assume 300 feet, for then respondent's position deteriorates even more. On the basis of 300 unconstructed feet, the actual permitted height of structures at the

2. The vulnerability of respondent's threshhold factual assertions is compounded by its disregard of other factors relevant to the issue of application. Thus:

(a) There is no showing that the toll road had to be built in the very place and at the very height selected or not at all, or that a shorter height and a more southerly route could not have been proportioned to each other to comply with the ordinance and suit the road about as well. On the other hand, the record shows positively that the airport's useableness was drastically impaired by the toll road. Since the burden of demonstrating unreasonable application rests upon respondent, its disregard of this element can only be justified by an assumption that in determining the reasonableness of zoning the effect of land use on neighboring property is irrelevant, and that it does not matter that solutions accommodating both property owners may be available. It need hardly be added that the assumption is at war with the premise underlying zoning.

(b) Assuming 18 feet is the relevant height limitation, and even disregarding the additional 1-foot elevation with each 40 feet of horizontal distance, the record does not show that this limitation deprived the property of beneficial use. The land is marsh, and so had little foreseeable intrinsic worth. Within its inherent limitations its probable useful purposes were unim-

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place of the toll road construction would be 25.6 feet, and at the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures would be 29.95 feet. Accordingly, on this assumption, as the toll road is built to a height of 29.8 feet, it could have been constructed at the original south boundary of the airport without violating the ordinance, so that the encroachment on the protected air space resulted from moving the south boundary northward a distance of 175 feet across the width of the river bed and locating the toll road at the new and nearer line.

paired. An allowable 18-foot elevation is ample for all one-story structures. Land with that height limitation is thus still useful for erection of low buildings, automobile parking, grazing, farming, storage, and many other purposes. As events happened to turn out possibly toll road construction was the best use to which the land could be put. But if "this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 592.

(c) Respondent acquired the property years after the ordinance was enacted and therefore with full notice of the limitations on its use. ". . . '[O]ne who purchases property with knowledge of the use restrictions thereon will generally not be permitted to claim special or unnecessary hardship . . .'" *Board of Zoning Appeals of City of Hammond* v. *Waskelo,* 240 Ind. 594, 168 N.E. 2d 72, 73. See also, 1 Metzenbaum, Law of Zoning, 802 (2d ed. 1955), and 1964 Supp. at 88-91.

3. Respondent's truncated approach is underscored by the standard expressed in section 14-422 of the Indiana Enabling Statute authorizing airport zoning (pet. br. p. 15a), and in section 6(1) of the CAA-NIMLO Model State Airport Zoning Act (res. br. p. 1a), both of which identically provide that:

> All airport zoning regulations adopted under this act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted

> at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

The judgment called for is a sophisticated blend of many factors. Obviously no single element controls. Whatever the particular height limitation, standing alone it cannot be decisive. Height limits prescribed by airport zoning have been validated at 27.64 feet (*Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla.), 30 feet (*Waring* v. *Peterson*, 137 So. 2d 268 (Fla. Ct. App.), and 35 feet (*Baggett* v. *City of Montgomery*, 160 So. 2d 6 (Ala.)). This Court has validated a height limit of 35 feet as part of a comprehensive zoning plan. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 381. There is no constitutional line between 18 feet, 22.45 feet, 27.64 feet, 30 feet, and 35 feet. 35 feet can be bad and 18 feet good, depending altogether on the cluster of other circumstances to which the specific height limit relates. Given nothing but a height limit, not enough appears to justify a judgment of invalidity.[10]

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[10] The FAA-recommended height limits, stressed by respondent (br. pp. 40-42), are of course not inconsistent with our thesis. The recommended limits are obviously designed to eliminate or at least minimize the risk of invalid application. The essence of cautious counseling is to stay wide of the dividing line when the dominating consideration is security from liability. But the line is well forward for those who wish to run the risk. In short, the FAA-recommended limit marks what is surely safe; it does not mark the constitutional minimum. No particular recommended height limit, however auspicious its sponsorship, has constitutional stature.

It should be noted that the regulation quoted at pp. 44-45 of respondent's brief has been superseded (27 Fed. Reg. 12349, December 13, 1962), and does not appear in the current codification of FAA regulations (14 CFR Part 151, as revised Jan. 1, 1964).

Accordingly, as in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595-596, "A careful examination of the record reveals a dearth of relevant evidence"; "the evidence produced is clearly indecisive on . . . reasonableness"; respondent therefore failed to carry its "burden on 'reasonableness.'" And it is hardly surprising that the record is barren of evidence on the issue of invalid application. Respondent did not try that issue, and under Indiana law was precluded from trying it, having made no effort to exhaust its administrative remedy.

4. Evidently concerned that its position does not square with "the decisions relating to the validity of comprehensive zoning laws", respondent seeks to distinguish "between such laws and height limitations in airport zoning regulations . . ." (res. br. pp. 48-50). Its essential thesis is that an airport zoning height limitation confers an avigation easement authorizing overflights through the air space above the land. It does no such thing. Respondent falls into the same misreading of *Causby* and *Griggs* as the court below. As has been explained (pet. br. pp. 48-50; NIMLO br. pp. 11-19), a height limit does no more than keep the air space clear of obstructions. Airport zoning makes it possible for planes to operate safely. But airport zoning does not license any use, much less oppressive use of air space detrimental to the land owner below. If interfering overflights ensue, *Causby* and *Griggs* provide a remedy, and airport zoning provides no defense.

Airport zoning and comprehensive zoning cannot be distinguished. These two, like other refinements in zoning, are all in the end bottomed on the need for rea-

sonable adjustment of competing land use.[11] Airport zoning is indeed part of comprehensive zoning. As amended in 1964, Section 9(d)(1) of the Federal Airport Act requires, as a condition of approval by the FAA Administrator of a project or advance planning and engineering proposal, that the Administrator be "satisfied that the project or advance planning and engineering proposal is reasonably consistent with plans (existing at the time of approval of the project or advance planning engineering proposal) of public agencies for the development of the area in which the airport is located. . . ."[12] Explaining this amendment, the FAA Administrator stated that:[13]

> To assure that comprehensive planning for municipalities, and metropolitan and regional areas will take into account airport requirements, we have established a very close working relationship with the Housing and Home Finance Agency and its constituent units. Under section 701 of the Housing Act of 1954, the HHFA makes grants to eligible local agencies for comprehensive planning, including necessary planning for airports.
>
> A firm understanding has been reached within the executive branch that the planning grant-in-aid programs administered by the HHFA will be made available, whenever possible, to accomplish airport planning in connection with local comprehensive planning. The HHFA has issued instructions to its regional offices on the inclusion of airports in local comprehensive planning projects

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[11] See, generally, Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 64 Yale L.J. 1120 (1964).

[12] Public Law 88-280, § 8(c), March 11, 1964.

[13] Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 13, 16 (1963).

> and inter-agency committees have been established at the regional levels to assure the integration of transportation planning.
>
> * * *
>
> . . . the provisions in the proposed bill make airport planning, you might say, subordinate to total regional and metropolitan planning and to the extent that airport development is inconsistent with such a plan, we are not able to proceed with a grant for expansion and construction purposes.

It is all one ball of wax.

III. RESPONDENT'S RELIANCE ON THE SETTLEMENT AGREEMENT BETWEEN IT AND GARY IS A COMPOUND OF IRRELEVANCE, INACCURACY, AND SPECULATION

In a variety of contexts, all irrelevant, respondent urges that its position is supported by a settlement agreement entered into between respondent and the City of Gary to resolve differences between them which had "finally resulted in an action being instituted by Gary against Commission . . ." (Def. ex. D; res. br. pp. 4, 51-52, 53-57). Consideration of respondent's contention requires a preliminary and accurate statement of what the record shows concerning this agreement.

1. The record shows, and only shows, the following:

(a) After petitioners had instituted their action against respondent, respondent moved the trial court for leave to file a third-party complaint against Gary, based on the settlement agreement, demanding judgment against Gary for all sums that may be adjudged against respondent and in favor of petitioners (Tr. 92-96). Gary demurred to the third-party complaint (Tr. 144-147), stating in part that (Tr. 145, ¶ 4):

> The settlement agreement between City of Gary and Indiana Toll Road Commission, attached as an exhibit to the "Third Party Complaint", expressly shows that it had to do only with the airport's northwest-southeast runway and had nothing to do with the airport's north-south runway, and plaintiffs' complaint counts only on alleged damage to them with respect to the north-south runway.

Gary's demurrer to the third-party complaint was sustained (Tr. 150), and judgment on the demurrer was rendered in favor of Gary and against respondent (Tr. 164). Respondent did not appeal.

(b) Respondent's answer to petitioners' complaint alleged that the settlement agreement was a bar to the action (R. 16-17 (¶ III), 18-19 (¶ V)). Petitioners demurred to this part of the answer (Tr. 162); the demurrer was sustained and respondent was given 20 days to plead over (Tr. 178); respondent filed an amended answer reasserting the settlement agreement as a bar (Tr. 179-182); petitioners moved to strike the amended answer relating to the settlement agreement (Tr. 212-214); the motion to strike was granted (Tr. 219).

(c) With the striking of respondent's answer pertaining to the settlement agreement, no issue concerning it was preserved for trial. At trial, respondent offered the settlement agreement into evidence, stating that its purpose was to show compliance by respondent with the Indiana Airport Enabling Act (Tr. 947).[14] In

[14] 5 Burns Ind. Stat. 14-417 provides in part that: "No state, county, city or other highway, road, street or other public way, no railroad, powerline, or other right of way of any kind or nature shall be laid out or opened across any airport or upon or in such

receiving the agreement in evidence, the trial court stated that (Tr. 948, emphasis supplied):

> I am going to let it go into evidence but only for the purpose of aiding the court to determine what the ultimate issues are, *but I can't see that this instrument is binding upon the plaintiffs in any way.*

(d) In view of the limited purpose for which the settlement agreement was received, respondent's present attempted use of it is altogether outside the scope of the issues that were tried. Furthermore, on the face of the agreement—and nothing else appears of record—nothing is disclosed which is germane. Part 2 of the agreement states that: "Subject to the modification and changes herein provided, the existing proposed route of Commission through Gary (as shown on Exhibit 1 attached hereto and made a part hereof) is approved." Exhibit 1, however, does not show that the proposed route corresponds with the toll road as actually constructed at the place and elevation that it intersects the aerial approach to the north-south runway. First of all, it does not show a proposed alteration of the original boundary between the airport and the toll road by shifting the river bed north by 175 feet over the existing south line of the airport property. Secondly, and conclusively, it shows nothing concerning the elevation of the road. It is not a con-

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proximity thereto as to affect the safe operation thereof without the approval of said board and council, both concurring." The settlement agreement was *not* approved by the Common Council of Gary, and the approval by the Gary Board of Aviation Commissioners was limited to a matter not presently germane (*infra*, pp. 23-24). Furthermore, the agreement did *not* approve the toll road construction at the place and elevation that it crossed the aerial approach to the north-south runway (*infra*, pp. 22-23).

tour map. It does not disclose elevation. And that is the critical point. For whatever the surface route of the road, it can comply with the ordinance so long as the elevation is maintained at the height limit prescribed by the ordinance. Since Exhibit 1 fails to show the elevation, the agreement cannot manifest approval of an unrevealed element. Indeed, despite earlier and persistent efforts to obtain accurate information, petitioners were unable to ascertain the elevation of the toll road until March 1956 when examination of a profile map secured by their engineers disclosed it (Tr. 753-757, 762-767; 1355-1359).

Finally, the agreement does not show approval of it by the Gary Board of Aviation Commissioners. While its president signed the agreement, the approval was in terms for a limited purpose. Part 17 of the agreement states that: "The parties signing this instrument, other than City of Gary by its Mayor, do so to evidence their consent to the taking by condemnation of such of their lands as will be necessary under the route attached as EXHIBIT 1." As recently as February 9, 1955, the President of the Board of Aviation Commissioners had said that he "wouldn't tolerate anything obstructing or causing a hazard to the use of either or both runways," and the Board "resolved to object to any construction or improvement of any kind by the Toll Road Commission that would in any manner create a hazard on any of our runways" (Tr. 1066, 1068, 1071); on August 10, 1955, after signing the agreement on August 4, the President informed the Board that he "was opposed to any obstruction that would in any way interfere with the operation of the airport" (Tr. 1060, 1059). As to Gary itself, its memo-

randum in support of the petition for certiorari states that (pp. 1-2):

> The decision below invalidates in toto the Airport Zoning Ordinance of the City of Gary. That ordinance was the governmental means chosen by Gary to protect safe and unobstructed approaches to the airport, to assure adjacent land use compatible with airport operations, and to serve these societal ends economically and with fairness to all. The decision below destroys the ordinance and precludes any recourse to airport zoning. It relegates Gary to financially prohibitive acquisition of property interests as the only way to protect its public airport. It outlaws airport zoning in reliance upon which existing investments were made and future improvements planned. It undercuts the main bulwark upon which Gary's participation in the National Airport Plan under the Federal Airport Act was predicated.

Finally, the settlement agreement was not signed by anyone on behalf of the Common Council of Gary, the body that enacted the ordinance.

2. Any tenable basis for respondent's reliance on the agreement is thus removed by the record itself.

(a) Based on the settlement agreement, respondent urges that "Until this lawsuit was instituted respondent had no reason to believe that there was any occasion for it to seek a variance" (res. br. p. 51). This is farfetched. The agreement did not approve the elevation of the road; it did not, and could not, repeal the ordinance and respondent's obligation to comply with it; it did not, and could not, bind petitioners; it therefore did not, and could not, provide any prudent basis for respondent's failure to seek a variance. Furthermore, prudent or not, failure to seek a variance was at its

own risk, not petitioners'. Finally, since it took institution of a lawsuit to get the agreement, and institution of a second lawsuit to attempt to secure compliance with the ordinance, it is fair to infer that respondent's *modus vivendi* was to act and let others sue. It is in no position to complain when suit succeeds in recalling to it the consequence of failure to observe obligations.

(b) Respondent contends that (1) petitioners' theory of action is that by the ordinance petitioners acquired an easement in the air space over the toll road property which the toll road construction infringed; (2) since the theory of action is premised on the acquisition of this easement, it follows of necessity that respondent is being subjected to an actual uncompensated appropriation of its property; and (3) the settlement agreement compelled this theory of action, for otherwise the agreement would have barred suit (res. br. pp. 53-57).

This is a breathtaking bit of verbal magic. But the facts stand in the way of the illusion. Nothing in the settlement agreement compels the theory of action that respondent imputes to petitioners. The agreement simply does not affect petitioners either in the subject that it covers or the parties that it binds. Respondent is thus at least twice removed from reality: it ascribes to the agreement a compulsion it does not have, and it ascribes to petitioners an apprehension they do not feel.

And the theory of action attributed to petitioners is newly discovered. Petitioners' theory was and is rather simple: the ordinance imposed an obligation on respondent; the injury to petitioners' leasehold that violation of the ordinance would cause gave petitioners

an enforceable interest in securing compliance with the ordinance;[15] and therefore violation of the ordinance, with resulting injury to petitioners, entitled them to injunctive relief and compensation for damages sustained by reason of respondent's breach. That is what the complaint stated (R. 8-9, ¶ 5-d). Respondent has not before had trouble understanding it. In the trial court, respondent stated that: "The essence of plaintiff's complaint is that defendant has violated an airport zoning ordinance respecting the minimum glide angle of aircraft utilizing the north-south runway of the Gary airport" (Tr. 153). In its brief below, respondent stated that the "rights asserted by appellees [petitioners] are based on the fact that they are lessees of a certain portion of the Gary Municipal Airport . . . Appellees contend that as such lessees they are entitled to compliance by appellant [respondent] with the terms of Ordinance No. 2897 . . ." (p. 231). And the court below summarized the action as one for damages to the leasehold resulting from violation of the ordinance (R. 208).

(c) Reliance on the settlement agreement is thus a huge red herring. It has nothing to do with the issue to be decided by this Court.

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[15] "The courts have been quite aggressive in permitting injured parties to avail themselves of the right to enter court for the purpose of enforcing their rights under zoning ordinances." 2 Metzenbaum, Law of Zoning, 1020 (2d ed. 1955). For an instance of implied power of private enforcement of a regulatory statute, see *J.I. Case Co.* v. *Borak*, 377 U.S. 426.

IV. THE DECISION BELOW DOES NOT REST UPON AN INDEPENDENT AND ADEQUATE STATE GROUND

Both respondent (br. pp. 24-30) and the United States (br. p. 2, n. 1) misunderstand, and therefore neither meets, the argument that the decision below conflicts with the Federal Airport Act. Lack of conflict is thought to follow from the premise that federal law does not prescribe airport zoning as the *sole* means of land use control to which state and local government *must exclusively* resort. Of course it does not. But that is not the point. Federal law prescribes airport zoning as a *principal and important* means of land use control to which state and local government *should significantly* resort. It is that predicate of federal law with which the total nullification of airport zoning worked by the decision below is in flat conflict. That acquisition of sufficient property interests is also important to complete airport planning, and that such acquisition is indeed an indispensable part of the total structure, does not detract from airport zoning as an independent and essential constituent of the scheme in its entirety. Walking is not the sole means of transportation but its elimination nonetheless conflicts with getting from one place to another.

It is beyond dispute that "adoption of zoning laws" by state and local government is central to the Federal Airport Act. That appears on the face of section 11(4) of the statute itself. Nor is the issue faced by describing the statutory scheme as "permissive." The so-called "permissive" means of securing recourse to airport zoning is to make resort to it a precondition to the grant of federal funds. When the realistic choice is between doing without an airport or an improvement to it, on the one hand, and compliance with federal con-

ditions to obtain financial aid essential to realization of the project, on the other, the actuality of federal prescription of standards can hardly be gainsaid. Congress had no doubt of the effectiveness of conditional grant of financial aid when it adopted it as its means of effectuating the National Airport Plan. ". . . [W]hen an airport qualifies for and receives Federal aid, it thereby gives up its purely local character and becomes a part of the national system of public airports. In becoming a part of the national system, some measure of local control must be given up. . . ." [16] Cooperative state-federal relations through participation in grant-in-aid programs is indeed an exemplar of contemporary federalism. A judicial decision which nullifies the federally-contemplated terms of the partnership destroys the federal plan.

This case vividly illustrates the conflict. Indiana through its enactment of the Airport Enabling Act and the Tall Structures Act, and its counties and municipalities through the adoption of local ordinances, have expressed the policy judgment of state and local government that there should be airport zoning (pet. br. pp. 35-38, 7a-15a; Atty. Gen. Ind. br., pp. 3-4 and nn. 1-3, 17-18). The precise condition that the Federal Airport Act is designed to realize for participation in the federal program is thus fulfilled. Entry into the state-federal partnership can be achieved. But the decision below frustrates the concord by its total nullification of airport zoning. Assuming that Article 1, Section 21 of the Indiana Constitution is the basis of decision, it simply provides that (R. 211, n. 1):

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[16] Bowers, *The Federal Viewpoint*, in *A Conference On Control And Protection of Airport Approaches*, 24 J. Air Law and Com. 170, 201 (1957).

> No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

Into this empty vessel, which on its face is divorced from the slightest governmental consideration of airport zoning either pro or con, the court below pours absolute prohibition of airport zoning. This ban is judicially-evolved in whole; it does not express but repudiates state governmental policy on airport zoning. It would therefore be fictive to take the decision below as an exercise of the State's option to decline as a matter of governmental policy to utilize airport zoning; it is rather a judicial determination that regardless of the legislatively-expressed governmental policy in favor of it airport zoning is constitutionally barred as inherently incompatible with property ownership. That determination collides with the Federal Airport Act.

Part of respondent's misconception derives from its treatment of the decision below as invalidation of a particular application of the ordinance instead of total voidance. Granted the general validity of airport zoning, whether a particular application is a taking rather than regulation will rarely generate a conflict question.* But the total invalidation of airport zoning, evolved as a judicial ban drawing on due process conceptions in repudiation of federal, state and local governmental policy in favor of it, inescapably collides with the Federal Airport Act.

Intelligent consideration of the validity of airport zoning is impossible without a full probe of the federal

role. An informed determination is literally dependent on a right reading of the federal law. The court below sensed that clearly. It was mistaken about, but not indifferent to, the import of federal activity (R. 216). Erroneously but ineradicably, *Causby* and *Griggs* are the bases of the court's decision (R. 212-213, 214). Substitute a right comprehension of the federal scheme and a right reading of *Causby* and *Griggs*, and the result below could remain the same only if reason is not relevant to adjudication. How can a ground of decision be independent of federal law when it is premised on it? And if independent, how can it be adequate, if the result is incompatible with federal law? The problem is simply too involved in federal law to be sensibly dissociated from it.

Respectfully submitted,

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December 1964

APPENDIX

CITY OF EAST CHICAGO, IND.

v.

SINCLAIR REFINING CO.

232 Ind. 295, 111 N.E.2d 459

No. 28794

SUPREME COURT OF INDIANA

March 27, 1953

BOBBITT, Judge.

Appellee has continuously, since the year 1916, owned and operated within the limits of appellant city an industrial plant for the manufacture and refining of petroleum products. In September of 1919 appellee purchased additional land adjacent to its plant and referred to in the complant herein as Parcel No. 1 containing 8.118 acres, and Parcel No. 2 containing 24.244 acres, for the sole and only purpose of industrial use in connection with the development and expansion of its industrial plant. The exact location of said Parcels 1 and 2 in relation to surrounding property is best shown by appellee's (plaintiff's) Exhibit 21, which is an aerial photograph of the two parcels of land and abutting and surrounding lands and buildings.

On December 26, 1929 appellant city adopted a zoning ordinance which, by its provisions, classified appellee's Parcel No. 1 for light industrial use and Parcel No. 2 for single-family dwellings. This ordinance was amended in November of 1946 and by this amendment the use classification of Parcel No. 2 was changed from one-family dwellings to two-family dwellings.

Appellee made no effert to use said land until 1945 when it requested of appellant that the restrictions on Parcel No. 2 be changed so as to permit the construction of laboratory buildings, which request was denied. Appellee now desires to erect and construct tanks for the storage of petroleum products on Parcel No. 2, and either such tanks or a railway car and equipment repair shop on Parcel No. 1.

It instituted this action for declaratory judgment to determine the force and effect, if any, of said amendatory zoning ordinance as it relates to the rights of appellee in and to the use of said two parcels of land.

Trial was by the court. Special findings of fact and conclusions of law were requested. Upon the facts specially found the trial court concluded that said ordinance "insofar as it restricts the use" of the two parcels described in the complaint was void because it violated Art. 1 Sec. 21 of the Constitution of Indiana, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, that it was without regard to public health, safety, morals and general welfare insofar as it restricted the use of appellee's two parcels of land, and that said ordinance was not enacted for any of the purposes set out in the statute and was unreasonable insofar as it restricted the use of the two parcels of land to the uses therein defined because "said lands are best suited for heavy industrial use". Judgment was entered declaring the ordinance "void and of no force and effect insofar as the same effects the use for other than heavy industrial purposes of the plaintiff's [appellee's] land," as described in the complaint.

The sole error here assigned is the overruling of appellant's motion for a new trial. This motion contains thirty-two separate specifications, the first of which is as follows:

> "1. The court erred in overruling the defendant's motion for a finding filed at the close of the plaintiff's

evidence, which motion was in words and figures as follows, to-wit:

"'At the close of plaintiff's case, and without prejudice to the right of the defendant to offer and introduce evidence in defense thereof, the defendant moves that the court make and enter a finding for the defendant for each of the following reasons, to-wit:

"'1. The plaintiff has not offered any evidence sufficient to sustain a right to a declaratory judgment;

"'2. The plaintiff has not offered any evidence sufficient to establish this cause;

"'3. The plaintiff, by its chief executive officer appearing in this cause has admitted that plaintiff seeks only a re-classification of the zoning of its property and has not proved that any petition for relief from the terms of Ordinance number 2449 as set forth in the complaint herein was filed with or presented to the Board of Zoning Appeals of the defendant city;

"'4. The plaintiff has not offered sufficient evidence to sustain any allegation of general invalidity of said ordinance 2449 and has not proved that any petition for relief from the classification, zoning, and/or restrictions of said ordinance in regard to the property described in plaintiff's complaint was presented to or filed with the Board of Zoning Appeals of the defendant city; * * *.'"

This motion raised a question of the jurisdiction of the subject matter of the particular case, which was not waived by the subsequent presentation of evidence by appellant (defendant).

Twelve other reasons are stated in support of the motion, but in view of the conclusion which we have reached we shall confine ourselves to a consideration only of the ones quoted above.

Appellant contends that since appellee sought only to have said ordinance declared unconstitutional and void as it affected and applied to its two parcels of land, it should have pursued and exhausted the administrative remedy provided by statute and the ordinance before seeking a determination of its rights in the courts.

Appellee contends that where the factual situation discloses that there has been a violation of constitutional rights, or that the exercise of the police power is clearly unreasonable, or where it is clearly shown that there is no real relation between the ordinance and its professed object, resort may be had to the courts to test the validity of the ordinance as it applies to one or more parcels of land, without first exhausting any administrative remedies which may be available and adequate.

Appellant relies upon City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E.2d 764, to support its position. That was also an action for a declaratory judgment seeking to declare a zoning ordinance of the city of South Bend, Indiana, unconstitutional insofar as it restricted or related to appellees' real estate. Appellees there sought to use certain real estate which was zoned for residential use for the purpose of building a filling station thereon or, in the alternative, to sell said property to a purchaser to be used for commercial purposes. The complaint inter alia alleged that the real estate was not suited for residential purposes and that its value for commercial use would be four to six times greater than for residential use; and that the ordinance constituted a taking of appellees' property without just compensation in violation of section 21 of article 1 of the Indiana Constitution, and the Fourteenth Amendment to the Constitution of the United States.

The overruling of appellants' demurrer in the Marckle case was assigned as an independent error. The memorandum accompanying the demurrer asserted that the complaint was bad because it failed to show that any appeal

was taken to the Board of Zoning Appeals or that certiorari was requested of the Circuit Court.

This court, at pages 82, 83 of 215 Ind., at page 767 of 18 N.E.2d, said:

> "Summarizing the opinions of the Appellate Court in the Ostrom[1] and O'Connor[2] cases and in the Waintrup[3] case, as herein distinguished, supra, we find that they are authority for the following rules: (1) A court will not review any exercise of the discretionary powers of a board of zoning appeals unless, of course, there is a clear abuse of discretion; (2) an appeal to the circuit court by way of certiorari is authorized when the board has acted illegally, and this is true even though the illegality arises out of a violation of the petitioner's constitutional rights, so long as it is not claimed that the entire zoning ordinance is invalid; and (3) where it is claimed that the entire zoning ordinance is void the remedy is not by resort to certiorari, but may be asserted by direct action. Applying the rules stated, it is apparent that the appellees have misconceived their remedy. They are not concerned with a modification of the terms of the ordinance as they apply to the district in which their properties are situated, so there was no occasion for them to ask an amendment thereof by the common council. They claim only that the ordinance, in its application to them, is unreasonable, in that the classification of their real estate for residential rather than commercial uses, deprives them of valuable property rights without due process or just compensation. Their properties are

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[1] Civil City of Indianapolis v. Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246.

[2] O'Connor v. Overall Laundry, Inc., 1934, 98 Ind. App. 29, 183 N.E. 134.

[3] Board of Zoning Appeals of the City of Indianapolis v. Waintrup, 1935, 99 Ind. App. 576, 193 N.E. 701.

shown to be located at the boundary of a zone district. Their case comes within the terms of that part of section 48-2304 Burns 1933, § 11657 Baldwin's 1934, which authorizes the board of zoning appeals to adjust conditions so as to prevent unnecessary hardships. Their complaint should have been directed, in the first instance, to the board of zoning appeals, and if that did not avail, they should have asked a review in the circuit court by way of certiorari."

We think the rules asserted by this court in City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E.2d 764, supra, are sound and in keeping with the recognized orderly procedure in the law of zoning.

Acts 1947, ch. 174, § 77, p. 571, § 53-778, Burns' 1951 Replacement, provides:

"The board of zoning appeals shall:

"1. Hear and determine appeals from and review any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of any ordinance or regulation adopted pursuant to sections 56 through 65 (§§ 53-756—53-766) of this act.

"2. Permit and authorize exceptions to the district regulations only in the classes of cases or in particular situations as specified in the ordinance.

"3. Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance.

"4. Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary

hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Ordinance No. 2449 of the City of East Chicago, adopted December 26, 1929, provides:

"Article XIV

"Board of Zoning Appeals

* * * * * * * * *

"Section 3. The Board of Zoning Appeals shall have the following powers and it shall be its duty:

"1. To hear and decide appeals where it is alleged there is error of law in any order, requirement, decision or determination made by the Building Commissioner in the enforcement of this Ordinance.

* * * * * * * * *

"4. To grant a variation in the regulations when a property owner can show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness, or shape, of a specific piece of property at the time of the effective date of this Ordinance, or where by reason of exceptional topographical conditions or other extraordinary or exceptional situations, the strict application of the terms of this Ordinance actually prohibits or unreasonably restricts the use of his property, and where the Board is satisfied, under the evidence heard before it, that the granting of such variation will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the owner; provided, however, that all variations granted under this clause shall be in harmony with the intended spirit and purpose of said Ordinance and shall not constitute a direct and obvious amendment of any district regulations or district boundaries.

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"Section 5. Any person or persons, firm or corporation, dissatisfied with the decision and action of the Board of Zoning Appeals may present to the Circuit or Superior Court of Lake County a petition for a writ of certiorari. The procedure for making such appeal shall conform to the requirements of the laws of the State of Indiana authorizing cities to adopt zoning regulations."

Both the statute and the ordinance here involved provide an administrative remedy for persons whose property is unreasonably restricted by the terms of the ordinance or where, owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship.

Where, as here, an administrative remedy is provided, it must be exhausted before judicial review may be requested. Marion Trucking Co. v. McDaniel Freight Lines, 1952, Ind. Sup., 108 N.E. 2d 884, 885; State ex rel. Evansville, etc. Lines v. Rawlings, 1951, 229 Ind. 552, 559, 99 N.E. 2d 597; Myers v. Bethlehem Shipbldg. Corp., 1938, 303 U.S. 41, 82 L. Ed. 638, 644, 58 S. Ct. 459; Stark v. Christie, 1941, 179 Md. 276, 19 A. 2d 716, 719; Sacer Realty Corporation v. Archer, 1946, 68 N.Y.S. 2d 277, 279; Glencoe Lime & Cement Co. v. City of St. Louis, 1937, 341 Mo. 689, 108 S.W. 2d 143, 144; Davis—Administrative Law, Primary Jurisdiction, § 197, p. 664; Conclusions, § 198, p. 673.

Appellee asserts that the holding of the Appellate Court in Civil City of Indianapolis v. Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246, supra, precludes its use of the administrative remedy in the case at bar, because of the area of the parcels of ground involved.

In that case the Board of Zoning Appeals attempted, upon its own motion, when no petition for variance or any appeal from any officer or board was pending before it, to reclassify and rezone six separate lots, comprising an entire city block. The Appellate Court there correctly held that

the Board had no authority to act in the absence of an appeal from an administrative officer or board charged with the enforcement of the ordinance. The court further held that an attempt to amend or change a whole city block without an ordinance by the common council was not contemplated by the act then in force, and such action was, therefore, void.

We approve the rule that a Board of Zoning Appeals has no authority to act unless its authority to do so has been legally invoked. However, we do not believe that the language used by Judge Kime in the Ostrom case to the effect that a Board of Zoning Appeals cannot, under the guise of a variance, reclassify an entire city block, can be adopted and used as a general rule or measuring stick, to be arbitrarily applied in every case and under all circumstances and conditions, for the purpose of determining what size tract or parcel of land may be considered by the Board of Zoning Appeals under the hardship provisions of the ordinance, or to determine at what particular point it becomes a matter for amendment of the ordinance by the common council.

Each zoning case must be decided upon its own factual situation. Potts v. Board of Adjustment, 1945, 133 N.J.L. 230, 43 A. 2d 850, 854; Smith v. Board of Appeals of Fall River, 1946, 319 Mass. 341, 65 N.E. 2d 547; Application of Devereux Foundation, 1945, 351 Pa. 478, 41 A. 2d 744, 746; Arditi Realty Co. v. Murdock, 1946, Sup., 67 N.Y.S. 2d 809.

The application of the unnecessary hardship doctrine is not governed solely by the size of the area or the particular piece of property upon which the unnecessary hardship is imposed. No single factor determines what constitutes unnecessary hardship, but all relevant factors, when taken together, must indicate that the special conditions are such that the property affected cannot reasonably be put to a conforming use because of the limitation imposed upon it by reason of the classification in which it is placed by the

terms of the ordinance. Brackett v. Board of Appeal of Building Department, 1942, 311 Mass. 52, 39 N.E. 2d 956; St. Onge v. City of Concord, 1949, 95 N.H. 306, 63 A. 2d 221, 223; Heffernan v. Zoning Board of Review, 1929, 50 R.I. 26, 144 A. 674, 676.

The conditions necessary to establish "unnecessary hardship" were concisely stated in Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E. 2d 851, at page 853:

> "Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."

See also: Calcagno v. Town Board, 1943, 265 App. Div. 687, 41 N.Y.S. 2d 140, affirmed 291 N.Y. 701, 52 N.E. 2d 592; Court Boulevard v. Board of Standards & Appeals, Sup., 1947, 72 N.Y.S. 2d 753.

We approve the rules above stated. In view of appellee's position that the land here in question cannot be made the subject of a variance because of its area, it may be pointed out that the above rules make no reference to the area or size of the property which may be considered in a variation of the ordinance on the ground of unnecessary hardship.

Courts cannot rezone property. Neither can they lay down any general rule defining the area or size of a particular piece of property which a Board of Zoning Appeals may consider under the unnecessary hardship rule. Each case must be determined on its own merits.

The Board of Zoning Appeals is authorized by statute to grant variances from the terms of the ordinance where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, so long as such action is not contrary to the public interest and the spirit of the ordinance is preserved and substantial justice is done. Whether or not an unnecessary hardship exists is a question of fact to be determined by the Board of Zoning Appeals. Board of Zoning Appeals v. Moyer, 1940, 108 Ind. App. 198, 27 N.E. 2d 905; Keeling v. Board of Zoning Appeals, 1947, 117 Ind. App. 314, 69 N.E. 2d 613.

When a Board of Zoning Appeals grants a variance from the provisions of an ordinance, it merely varies the use to which a certain particular piece of property may be put—it does not rezone the land covered by the variance. In Indiana the power to rezone is vested in the Common Council.

Appellee asserts that City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra, is in conflict with the holding of the United States Supreme Court in Euclid, Ohio v. Ambler Realty Co., 1926, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016, upon which it relies, because the overruling by the trial court of a motion to dismiss on the ground that appellee had made no effort to obtain a building permit or apply to the Board of Zoning Appeals for relief and, therefore, the suit was premature, was sustained. That was a suit to enjoin the enforcement of a zoning ordinance and all attempts to impose *any* of the restrictions, limitations or conditions thereof as to appellee's property.

The attack there was directed "not against any specific provision or provisions, but against the ordinance as an entirety." While in the Marckle case appellees sought, in an action for declaratory judgment, to have the ordinance declared unconstitutional only insofar as it restricted or

related to the use of their real estate, and it was not claimed that the entire ordinance was invalid.

These cases are clearly distinguishable. The Marckle case falls within rule 2 as stated by this court in City of South Bend v. Marckle, 1939, 215 Ind. 74, 82, 18 N.E. 2d 764, supra, while the Euclid case clearly falls within rule 3.

Appellee further relies upon Nectow v. City of Cambridge, 1928, 48 S. Ct. 447, 277 U.S. 183, 72 L. Ed. 842, where an ordinance of the City of Cambridge, Massachusetts, was directly attacked under circumstances and for the same reasons as are present in the case at bar. However, in that case the question of the failure of the appellant to exhaust the administrative remedy provided, if any, (no mention of such is made in the opinion) before resorting to court action, was not raised. Hence it is not authority for declining to pursue and exhaust the administrative remedy available to appellee herein.

Appellee cites a number of cases in support of its alleged right to follow the method of procedure which it has elected to pursue herein. Without unnecessarily extending this opinion by a discussion of these authorities, we believe it sufficient to note that in some of them the question of remedy was not an issue, in others the attack was upon the ordinance as a whole, while others are distinguishable because of the factual situations upon which the decision rests.

In some jurisdictions resort may, under certain circumstances, be had to the courts for a direct attack upon a Zoning Ordinance because of its effect on a particular piece of property without first exhausting any available administrative remedy. However, the factual situation here does not present such a set of circumstances.

The case at bar falls clearly within City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra. As we have said, that was an action for a declaratory judgment to declare the South Bend Zoning Ordinance unconstitu-

tional and void insofar as it restricted or related to the use of three contiguous lots owned by appellees. There, as here, appellees sought only to use their property for a purpose different from the use classification imposed upon it by the ordinance. They alleged, as does appellee herein, that their real estate was not suitable for residential purposes, and that it would be worth several times as much for business purposes; and that the ordinance constituted a taking of their property without just compensation.

The prayer for relief in the Marckle case was that the ordinance be declared unconstitutional insofar as it restricted or related to appellees' (Marckle and others) real estate, while in the case at bar appellee seeks a determination of the force and effect of the ordinance and, if any, its effect upon the use of said parcels 1 and 2 as described in the complaint. The end result sought is the same in both cases. The fact that one case involved three contiguous lots, the dimensions of which are not mentioned in the opinion, and the other involves two undeveloped parcels of land containing 8.118 and 24.244 acres, respectively, does not, under the issues here involved, distinguish one case from the other as a matter of principle.

Insofar as City of Indianapolis v. 'Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246, supra, proposes to restrict the area which may be considered by a Board of Zoning Appeals under the unnecessary hardship rule, it is limited to the particular circumstances of that case.

The factual situation here brings appellee's case within the provisions of § 77, of ch. 174, Acts 1947, being § 53-778, Burns' 1951 Replacement, supra, which authorizes the Board of Zoning Appeals to vary a zoning ordinance to prevent unnecessary hardships which, by the provision of the ordinance, may be imposed upon a particular property.

In seeking a variance, under the circumstances herein, appellee should have applied to the building commissioner

for a permit and, if denied, then an appeal from the order of denial should have been prosecuted to the Board of Zoning Appeals and, if dissatisfied with the decision of this Board, then it should have pursued the administrative remedy further by petition for writ of certiorari to the Circuit or Superior Court setting forth, as provided by statute, that the decision of the board was illegal, in whole or in part, and specifying the ground of the illegality. If the order complained of amounted to an invasion of appellee's constitutional rights this question could have been determined by the court on the petition for certiorari, so long as it was not claimed that the entire ordinance was void. City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra; People v. Calvar Corp., 1941, 286 N.Y. 419, 36 N.E. 2d 644, 136 A.L.R. 1376, Id., Co. Ct., 69 N.Y.S. 2d 272; Goodwin v. City of Louisville, 1948, 309 Ky. 11, 215 S.W. 2d 557; City of Little Rock v. Hunter, 1950, 216 Ark. 916, 228 S.W. 2d 58; Applestein v. City of Baltimore, 1928, 156 Md. 40, 143 A. 666; Park Ridge Fuel & Material Co. v. City of Park Ridge, 1929, 335 Ill. 509, 167 N.E. 119; State v. Roberson, 1929, 198 N.C. 70, 150 S.E. 674; Caulwal Const. Co. v. Burwell, 1930, 136 Misc. 259, 240 N.Y.S. 456; Towers Management Corporation v. Thatcher, 1936, 271 N.Y. 94, 2 N.E. 2d 273; Payne v. Borough of Sea Bright, 1936, 14 N.J. Misc. 756, 187 A. 627; Provo City v. Claudin, 1936, 91 Utah 60, 63 P. 2d 570; Home Fuel Oil Co. v. Borough of Glen Rock, 1937, 118 N.J.L. 340, 192 A. 516; Glencoe Lime & Cement Co. v. City of St. Louis, 1937, 341 Mo. 689, 108 S.W. 2d 143, supra; Washington v. City of Dallas, 1942, Tex. Civ. App., 159 S.W. 2d 579; Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 60 A. 2d 754; S. S. Kresge Co. v. City of New York, 1949, 194 Misc. 645, 87 N.Y.S. 2d 313, affirmed 275 App. Div. 1036, 92 N.Y.S. 2d 414; Cleveland Trust Co. v. Village of Brooklyn, 1952, 92 Ohio App. 351, 110 N.E. 2d 440, 448.

The administrative procedure provided by the zoning statute and which must be followed before recourse to the

courts may be had, insures the benefit of trained and experienced opinion and judgment in zoning matters applied to the facts of each particular case. The Board of Zoning Appeals is not limited to an affirmance or reversal of the action of the building commissioner or other administrative officer charged with the enforcement of the ordinance, but may use its judgment and discretion in making such modification of the official's order and attach such conditions and restrictions to the granting of a variance as in its opinion should be made, so that the spirit of the ordinance shall be observed and substantial justice done.

Appellee might also have had relief from its alleged unnecessary hardship by seeking an amendment to the zoning ordinance in the manner provided by Art. 14 thereof. Either of these remedies might have furnished appellee, without resort to the courts, the relief which it is seeking.

For the foregoing reasons the judgment of the trial court is reversed with instructions to sustain appellant's motion for a finding for the defendant at the close of plaintiff's evidence, and for further proceedings not inconsistent with this opinion.[1]

Judgment reversed.

[1] Rule 2-6 as amended Nov. 30, 1949.